

2491
No. 11705

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM I. HEFFRON, Trustee of the Estate of
Quartz Crystal Products Co., a limited partnership
composed of Raymond I. Biggy, John W. Buol and
James F. Collins, Bankrupt,

Appellant,

vs.

U. S. MACHINERY COMPANY,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

NOV 14 1947

PAUL P. O'BRIEN,
CLERK

No. 11705

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM I. HEFFRON, Trustee of the Estate of
Quartz Crystal Products Co., a limited partnership
composed of Raymond I. Biggy, John W. Buol and
James F. Collins, Bankrupt,

Appellant,

vs.

U. S. MACHINERY COMPANY,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

| | Page |
|---|------|
| Adjudication and of General Reference, Order of..... | 4 |
| Answers of Peter De Michelis to Interrogatories..... | 38 |
| Appeal: | |
| Designation of Points on and Parts of Record to Be Printed (Circuit Court)..... | 192 |
| Notice of | 135 |
| Statement of Points on..... | 136 |
| Certificate of Clerk..... | 139 |
| Certificate on Review, Referee's..... | 5 |
| Certificate on Review, Supplement to Referee's..... | 104 |
| Désignation of Points on Appeal and Parts of Record to Be Printed (Circuit Court)..... | 192 |
| Exhibits: | |
| Respondent's Exhibit (See Index to Exhibits) | |
| Trustee's Exhibits (See Index to Exhibits) | |
| Findings of Fact, Conclusions of Law and Order of Referee re U. S. Machinery Company, et al..... | 52 |
| Memorandum of Opinion of Referee and Direction for Further Hearing | 26 |
| Memorandum Opinion of Referee..... | 44 |
| Names and Addresses of Attorneys..... | 1 |
| Notice of Appeal..... | 135 |
| Opinion of District Judge..... | 123 |
| Order of Adjudication and of General Reference..... | 4 |

| | Page |
|---|------|
| Order of District Judge on Petition for Review..... | 134 |
| Order of Referee to Take Testimony, etc..... | 37 |
| Order to Show Cause, etc. on Petition of Trustee..... | 12 |
| Order to Show Cause, etc. on Petition of U. S. Machinery Co. | 20 |
| Petition for Review of Referee's Order..... | 59 |
| Petition in Bankruptcy, Debtor's..... | 2 |
| Petition of U. S. Machinery Company to Reclaim Property | 14 |
| Petition of Trustee for Order to Show Cause and Restraining Order | 9 |
| Petition of Trustee for Order to Show Cause, Amended | 21 |
| Points and Authorities on Petition for Review..... | 107 |
| Points on Appeal and Parts of Record to Be Printed, Designation of (Circuit Court)..... | 192 |
| Referee's Certificate on Review..... | 5 |
| Referee's Certificate on Review, Supplement to..... | 104 |
| Reporter's Transcript of Excerpts Taken From Proceedings Held in the Above-entitled Case on April 19, 1946, and August 2, 1946..... | 141 |
| Testimony on Behalf of Petitioner: | |
| Henry, Clyde W.— | |
| Direct examination | 141 |
| Direct examination (recalled)..... | 179 |
| Satterfield, Harry— | |
| Direct examination | 186 |
| Statement of Points on Appeal..... | 136 |
| Stipulation and Order re Record on Appeal, Dated August 4, 1947..... | 138 |
| Stipulation and Order re Record on Appeal, Dated August 7, 1947..... | 137 |

INDEX TO EXHIBITS

Trustee's Exhibits:

| No. | Page |
|--|------|
| 1. Lease agreement with reference to 60 Caterpillar tractor, etc. (In Transcript)..... | 61 |
| 2. Lease agreement with reference to the trommel, etc. (In Transcript)..... | 66 |
| 4. Sales invoice for a Caterpillar tractor dated October 4, 1944 (In Transcript)..... | 71 |
| 5. Sales invoice for a trommel and pump, dated October 4, 1944 (In Transcript)..... | 72 |
| 6. Letter to Raymond I. Biggy from Clyde Henry, dated December 11, 1945, and reply, dated December 13, 1945 (In Transcript)..... | 73 |
| 7. Claim and delivery action, Superior Court File No. 3171 (In Transcript)..... | 75 |
| 8. Claim and delivery action, Superior Court File No. 3172 (In Transcript)..... | 88 |
| 9. Telegram, dated December 31, 1945, from Mr. Biggy to Clyde Henry (In Transcript)..... | 102 |
| 16. Letter, dated November 1, 1945, to Harry Gottesfeld from Clyde Henry (In Transcript).. | 103 |

Respondent's Exhibit:

| No. | Page |
|---|------|
| 1. Certificate of business (fictitious firm name) (In Transcript) | 105 |

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

GEORGE T. GOGGIN

817 H. W. Hellman Building

354 South Spring Street

Los Angeles 13, Calif.

For Appellee:

CHARLES A. THOMASSET

319 Story Building

610 South Broadway

Los Angeles 14, Calif. [1*]

DEBTOR'S PETITION

Form No. 1

In the District Court of the United States for the
Southern District of California
Central Division

No. 44274-Y

In the Matter of QUARTZ CRYSTAL PRODUCTS
CO., a Limited Partnership, RAYMOND I. BIGGY,
JOHN W. BUOL, and JAMES F. COLLINS, sole
general partners,

Bankrupt.

To the Honorable Judge of the District Court of the
United States for the Southern District of Cali-
fornia:

The Petition of Raymond I. Biggy, John W. Buol and
James F. Collins, sole general partners, in the City of
San Andreas, County of Calaveras, State of California,
by occupation a, and employed
by (or engaged in the business of
mining), respectfully represents:

1. Your petitioner has had his principal place of
business (or has resided, or has had his domicile) at
San Andreas, California (Long Beach, California), with-
in the above judicial district, for a longer portion of
the six months immediately preceding the filing of this
petition than in any other judicial district.

2. Your petitioner owes debts and is willing to sur-
render all his property for the benefit of his creditors,

except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that it may be adjudged by the court to be a bankrupt within the purview of said Act.

RAYMOND I. BIGGY

JOHN W. BUOL

JAMES F. COLLINS

Petitioners

BURKE MATHES

Attorney for Petitioners

[Verified.]

[Endorsed]: Filed Feb. 25, 1946. [2]

United States District Court
Southern District of California

ORDERS OF ADJUDICATION AND OF
GENERAL REFERENCE

At Los Angeles, in said District, on February 25, 1946, the respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number 44,274-Y.

Title of Proceedings Quartz Crystal Products Co., a limited copartnership, composed of Raymond I. Biggy, John W. Buol, and James F. Collins.

Filed 2-25-46.

Referee Hubert F. Laugharn, Esq., Los Angeles, Calif.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Feb. 25, 1946. [3]

[Title of District Court and Cause]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Leon R. Yankwich, Judge of the
United States District Court for the Southern Dis-
trict of California, Central Division:

I, Hubert F. Laugharn, Referee in Bankruptcy to
whom the above entitled matter has been referred, do
hereby certify as follows:

On the 28th day of January, 1947, an order was made
herein upon the Petition in Reclamation of the U. S.
Machinery Company. In the said Petition in Reclama-
tion the said petitioner sought possession of certain ma-
chinery and equipment in the possession of the Trustee.
The said order of January 28, 1947 determined that the
said personal property was an asset of the bankrupt
estate, that the said petitioner was not entitled to pos-
session thereof, and that there was owing by the petitioner
to the Trustee herein the amount of \$1,331.85.

That within the time as provided by the provisions of
the Bankruptcy Act and the Rules of this Court, a Peti-
tion for Review [4] was filed upon behalf of the said
U. S. Machinery Company.

The order sought to be reviewed herein determined
that two certain agreements in writing dated November
10, 1944, and not recorded until December 18, 1944,
were invalid under Section 2980 of the Civil Code of
the State of California.

The petitioner's entire grounds for review are set
forth in Paragraph II of its review:

"That petitioner alleges that each of said agree-
ments was executed on December 14, 1944, and re-

corded on December 18, 1944, and is valid as to the Trustee herein and the creditors of this estate and that the said order, and the whole thereof, is erroneous and that the Honorable Referee herein erred in refusing to grant the relief prayed for in said petition for reclamation of this petitioner."

It would seem therefore that the question for consideration herein, in so far as the petitioner is concerned, is whether or not the contracts were "executed" on December 14, 1944. If so, then it might be argued that the recordation of the contracts on December 18, 1944 would comply with the provisions of the said Section 2980.

At the conclusions of the hearings herein, I made and filed a Memorandum Opinion which sets forth in full the details of the problem presented herein and the reasons for my ruling.

I place very little weight upon the testimony of the witness produced by Mr. Henry, who is presumed to have been with Mr. Henry at a time when he went into a service station and executed the contracts upon a date fixed as December 14, 1944. The contracts were prepared on November 10, 1944, down payments were made and the property was delivered. I found that the contracts were executed by the buyers on November 14, 1944 and were mailed to the office of the seller on that day. As to the "execution" of the agreement, to comply with the said Section 2980 of the Civil Code it was my [5] opinion that this should in any event be presumed to be either on November 14, 1944, or in any event only two or three days thereafter.

Otherwise to defeat the terms of the section the seller could deliver the property, receive the consideration and then withhold the actual signing of the instrument for a year and it might be argued that there was no violation of the said section because of non-recording within the time prescribed by the section after execution.

The within review appears to be directed solely to the question of the date of execution of the lease or title retaining contracts in relation to the date of recording thereof. The trustee in effect adopted the contracts and the Findings and the Order of January 28, 1947 determine that the U. S. Machinery Company had been paid more than its unpaid balance thereon.

I understand from counsel for the petitioner for review herein that certain portions of the transcript of the evidence pertaining to the "execution" of the agreements of November 10, 1944 by Mr. Henry for the U. S. Machinery Company will be secured from the reporter and presented to the Judge herein.

In compliance with the provisions of Section 39a(8), I attach to this Certificate the following:

- (1) Petition for Order to Show Cause and Restraining Order.
- (2) Order to Show Cause and Restraining Order.
- (3) Answer to Petition for Order to Show Cause and Restraining Order.
- (4) Petition to Reclaim Property.
- (5) Order to Show Cause.
- (6) Amended Petition for Order to Show Cause.
- (7) Order Authorizing Amendment to Petition for Order to Show Cause, etc.

- (8) Memorandum of Opinion and Direction for Further Hearing. [6]
- (9) Order to take testimony of Peter de Michelis and Joe W. Zwinge together with Interrogatories to be Propounded to Pete de Michelis on behalf of U. S. Machinery Company; Cross Interrogatories to be Propounded to Pete de Michelis on behalf of Trustee; Interrogatories to be propounded to Joe W. Zwinge, Sheriff, Calaveras County, California, on behalf of the Trustee, and Cross-Interrogatories to be Propounded to Joe W. Zwinge, Sheriff of Calaveras County, California, on behalf of U. S. Machinery Co.
- (10) Answers to Interrogatories propounded to Peter De Michelis on behalf of U. S. Machinery Company.
- (11) Copy of Writ of Attachment.
- (12) Testimony of Joe W. Zwinge, Sheriff.
- (13) Memorandum Opinion.
- (14) Findings of Fact, Conclusions of Law, and Order re U. S. Machinery Company, et al.
- (15) Notice.
- (16) Petition for Review of Referee's Order.
- (17) Trustee's Exhibits 1 to 16 inclusive (except Exhibit 10 consisting of various bills from J. E. Coberly Inc. re repairs to car).
- (18) Reporter's Transcript.

Dated: February 28, 1947.

Respectfully submitted,

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed [illegible].

[Endorsed]: Filed Feb. 28, 1947. [7]

[Title of District Court and Cause]

PETITION FOR ORDER TO SHOW CAUSE AND
RESTRAINING ORDER

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy for the Above-Entitled Bankrupt Estate:

The verified petition of William I. Heffron respectfully represents to the Court as follows:

I.

That he is the duly appointed, qualified and acting Receiver for the estate of the above-named bankrupt.

II.

That among the assets and effects of this estate coming into the possession and under the control of your Receiver is certain machinery, fixtures and equipment consisting of mining machinery, a portion of which is described as follows:

Trommel and screen, 5'x35', incl. steel base, trunnions and drive chaine,

7" Centrifugal water pump, direct connected to 30 HP Motor (this unit is now connected by V-belt drive, V-pulleys and V-belts property of Company),

Stacher and belt - 100 ft. of light steel fabricated frame 100' 24" wide 5 ply conveyor belt. Tail and head pulleys, troughing rolls and idlers installed in frame, [8]

Tractor and bulldozer - Cat. 60, with 10' blade, Flexible coupling unit for pump and motor.

That in addition to the foregoing there is considerable other miscellaneous equipment, all valued in excess of \$18,000.00.

III.

That prior to the appointment of your Receiver there was heretofore filed in the Superior Court of the State of California, in and for the County of Calaveras, case No. 3152, entitled "J. T. Evans vs. Quartz Crystal Products Co." wherein there was issued and levied out of said Court a writ of attachment; that by virtue thereof, the Sheriff of Calaveras County, to wit: Joe W. Zwinge, has taken over constructive custody of the personal property of the above-named bankrupt.

IV.

That subsequent to the filing of the aforementioned action, there was filed a complaint on claim and delivery by the U. S. Machinery Company against the above-named bankrupt, being cases No. 3171 and No. 3172. That in said action they have deposited a bond in the sum of \$5,000.00 and are attempting to remove the following described property:

1 60 Caterpillar Tractor No. PA-3361,

1 Byron Jackson Pump and Motor.

That your petitioner is informed and believes, and therefore alleges, that the aforementioned property was sold by the said U. S. Machinery Company upon a conditional sales contract, and that there is a balance due on said contract of approximately \$1,968.29. That the said property is valued in excess of \$5,000. That, accordingly, there is a substantial equity in said property for the benefit of creditors of this estate, and that your peti-

tioner proposes to preserve said equity for the benefit of the creditors herein, and to pay off the balance due upon said conditional sales contract when the aforementioned property is sold under an order of this Court. [9]

V.

That all of said actions have been filed within four months of the filing of the bankruptcy proceedings herein, and that the Court herein has exclusive jurisdiction over said property.

VI.

That the Sheriff of Calaveras County State of California, to wit: Joe W. Zwinge, has no beneficial interest in and to the hereinbefore described personal property.

Wherefore, your petitioner prays that an order to show cause be issued and directed against U. S. Machinery Company, Clyde W. Henry, its agent, or any of its other representatives, attorneys or servants, against J. T. Evans, against Pete D'e Michilos, and against Joe W. Zwinge, Sheriff of Calaveras County, State of California, to be and appear before this Court, on a day certain, to show cause, if any they have, why an order should not be made and entered permanently enjoining and restraining said parties, and each of them, from in any wise attempting to remove, transfer, sell, or otherwise dispose of the property hereinbefore mentioned and described, and authorizing the Receiver, or the Trustee, to sell the said property free and clear of any right, title, or interest of the said persons in and to said property, and why a further order should not be made and entered herein ordering and directing that any *and* liens and rights of said persons in and to said property be transferred to the proceeds of said sale.

Petitioner further prays that pending the hearing of the order to show cause herein that the Court herein enter a temporary restraining order enjoining and restraining the said persons from in any wise interfering with your Receiver in taking over said property and enjoining and restraining said persons from in any wise attempting to remove, sell, or transfer said property.

WILLIAM I. HEFFRON

GEORGE T. GOGGIN

Attorney for Receiver [10]

[Verified.]

[Endorsed]: Filed Feb. 28, 1947. [11]

[Title of District Court and Cause]

ORDER TO SHOW CAUSE AND RESTRAINING
ORDER

To U. S. Machinery Company, and to Clyde W. Henry, its agent, or any of its other representatives, attorneys or servants; J. T. Evans; Pete D'e Michilos; and Joe W. Zwinge, Sheriff of Calaveras County, State of California.

Upon reading and filing the verified petition of William I. Heffron, Receiver for the above-entitled bankrupt estate, good cause appearing therefor, and upon motion of George T. Goggin, attorney for said Receiver, and no adverse interests appearing thereat,

It Is Ordered that U. S. Machinery Company, and Clyde W. Henry, its agent, or any of its other repre-

sentatives, attorneys or servants, and J. T. Evans, Pete D'e Michilos, and Joe W. Zwinge, Sheriff of Calaveras County, State of California, be and appear before this Court in the courtroom of the Honorable Hubert F. Laugharn, Referee in Bankruptcy, 340 Federal Building, Los Angeles, California, [12] on the 11 day of March, 1946, at the hour of 10 o'clock A. M. thereof, and show cause, if any they have, why an order should not be made and entered herein ordering and directing Joe W. Zwinge, Sheriff of Calaveras County, State of California, to immediately and forthwith release the property held by him under the attachment as set forth in the petition hereto attached, and why he should not immediately vacate the premises of the above-named Bankrupt.

It Is Further Ordered that the U. S. Machinery Company, and Clyde W. Henry, its agent, or any of its other representatives, attorneys or servants, and J. T. Evans, Pete D'e Michilos, and Joe W. Zwinge, Sheriff of Calaveras County, State of California, be, and they are hereby enjoined and restrained from in any wise interfering with the Receiver herein in taking over said property, and they, and each of them, are hereby restrained and enjoined from in any wise attempting to remove, sell, or transfer said personal property set forth and described in the petition hereto attached.

Dated this 1 day of March, 1946.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Feb. 28, 1947. [13]

[Title of District Court and Cause]

PETITION TO RECLAIM PROPERTY

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy for the Above Entitled Bankrupt Estate:

The verified petition of U. S. Machinery Company, a corporation, respectfully represents:

I.

That petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of California and at all times herein mentioned doing business in the State of California.

II.

That on the 25th day of February, 1946, bankrupt above-named filed a voluntary petition herein praying that it be adjudicated bankrupt; that said bankrupt was adjudicated bankrupt on said day; that William I. Heffron was appointed receiver for the estate of [14] the above-named bankrupt on the 27th day of February, 1946, qualified on said day, and ever since has been and now is acting as receiver for the estate of said bankrupt.

III.

That on or about the 10th day of November, 1944, your petitioner and the bankrupt above-named entered into a written agreement of lease in words and figures as follows:

(Here is set forth the contract being Trustee's Exhibit No. 1.)

IV.

That on or about the 10th day of November, 1944, your petitioner and bankrupt above-named entered into another written agreement of lease in words and figures as follows:

(Here is set forth the contract being Trustee's Exhibit No. 2.)

V.

That subsequent to the execution of both of said agreements alleged in paragraphs III and IV, supra, this petitioner delivered, under and pursuant to the terms of said agreements, to the bankrupt above-named all of the property described in said agreements.

VI.

That subsequent to the execution of the agreement alleged in paragraph III, supra, the bankrupt above-named defaulted in the payment of the installment which became
HFL May
due on the 25th day of April, 1945, and in the payment of each and every installment which became due thereafter, and each and every one of said defaults still continue.

VII.

That subsequent to the execution of the agreement alleged in paragraph IV, supra, the bankrupt above-named defaulted in the payment of the installment which became due on the 25th day of April [15] 1945, and in the payment of each and every installment which became due thereafter, and each and every one of said defaults still continue.

VIII.

HFL 21st

That on or about the ~~24~~²⁵th day of February, 1946, this petitioner as plaintiff filed an action in claim and delivery in the Superior Court of the State of California in and for the County of Calaveras, entitled "U. S. Machinery Company, a corporation, plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, defendants," said action bearing No. 3172 on the Register of Actions of the Clerk of said Court; that by said action the immediate delivery to plaintiff of all of the property described in said agreement set forth in paragraph III, supra, and filed a bond therein in the sum of \$5,000.00; that the said Superior Court did thereupon order the immediate delivery to plaintiff in said action, your petition herein, of all of the said property described in said agreement set forth in paragraph III, supra.

IX.

HFL 21st

That on or about the ~~24~~²⁵th day of February, 1946, this petitioner as plaintiff filed an action in claim and delivery in the Superior Court of the State of California in and for the County of Calaveras, entitled "U. S. Machinery Company, a corporation, plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, defendants," said action bearing No. 3171 on the Register of Actions of the Clerk of said Court; that by said action the immediate delivery to plaintiff of all of the property described in said agree-

ment set forth in paragraph IV, *supra*, and filed a bond therein in the sum of \$7,290.00; that the said Superior Court did thereupon order the immediate de- [16] livery to plaintiff in said action, your petitioner herein, of all of the said property described in said agreement set forth in paragraph IV, *supra*.

X.

That William I. Heffron has been appointed trustee herein, and is now the qualified and acting trustee for the estate of the above-named bankrupt; that said receiver and said trustee claim some right, title and interest in and to the property described in said agreements set forth in paragraphs III and IV *supra*; that the said claim of the said receiver and said trustee is without any right whatsoever and said trustee and said receiver have neither right, title nor interest, nor have the bankrupt or the creditors thereof any right, title or interest in and to the said property.

XI.

That under and pursuant to the aforesaid orders in said actions in claim and delivery petitioner has repossessed a portion of said property, that the balance of said property described in paragraphs III and IV, *supra*, is now in the possession of said receiver and trustee, and each of them.

XII.

That petitioner has made demand upon the said receiver for the surrender of possession of said property

and said receiver has failed and refused to comply with said demand.

XIII.

That petitioner, the Lessor in both of said agreements, has expended and incurred by way of attorney's fees, court costs and otherwise, to enforce the said agreements of lease, the payment of rentals due thereunder, and to repossess the property therein described, the sum of approximately \$2500.00, no part of which has been paid and the whole of which is due and owing from said bankrupt. [17]

XIV.

That petitioner is informed and believes and therefore alleges that the property described in the agreements set forth in paragraphs III and IV, supra, has been subjected to attachments issued in that certain action filed in the Superior Court of the State of California, in and for the County of Calaveras, entitled "J. T. Evans vs. Quartz Crystal Products Co."

Wherefore, your petitioner prays that an order to show cause be issued and directed against William I. Heffron, receiver herein, his agent, attorneys and representatives, and against William I. Heffron, trustee herein, his agent, attorneys and representatives, to be and appear before this court on a day certain; to show cause, if any they have, why an order should not be made and entered:

(1) Permanently enjoining and restraining said parties, and each of them, from in any wise attempting to

interfere with the repossession of all of the property described in the agreements set forth in paragraphs III and IV, *supra*, by this petitioner;

(2) Ordering said receiver and said trustee to release and surrender unto this petitioner any of said property which may be in the possession or control thereof;

(3) Decreeing that the said receiver and trustee and bankrupt have neither right, title, nor interest in and to any of the said property;

(4) For the sum expended or incurred in repossessing said property described in the said agreements set forth in paragraphs III and IV, *supra*, and in enforcing said agreements and recovering the rentals due thereunder; and for such other and further relief as may be meet in the premises.

U. S. MACHINERY COMPANY

By Clyde W. Henry, President

Petitioner

CHARLES A. THOMASSET

Attorney for Petitioner [18]

[Verified.]

[Endorsed]: Filed Mar. 29, 1946.

[Endorsed]: Filed Feb. 28, 1947. [19]

[Title of District Court and Cause]

ORDER TO SHOW CAUSE

To William I. Heffron, Receiver Herein, and to William I. Heffron, Trustee Herein:

Upon reading and filing the verified petition of the U. S. Machinery Company, a corporation, and good cause appearing therefor and upon motion of Charles A. Thomasset, attorney therefor,

It is ordered that William I. Heffron, receiver herein and trustee herein, be and appear before this court in the court room of the Honorable Hubert F. Laugharn, Referee in bankruptcy, 340 Federal Building, Los An-

geles, California, on the 8 day of ~~March~~ April, 1946, at the
2 P. M.

hour of ~~10 A. M.~~ thereof, and show cause, if any they have, why an order should not be made and entered herein ordering and directing said receiver and said trustee, and each of them, immediately and forthwith to release all of the property [20] held thereby, and described in the agreements of lease set forth in paragraphs III and IV, respectively, in the petition for reclamation of said U. S. Machinery Company, on file herein, which petition is hereto attached, and why an order should not be made herein and entered granting the prayer of said U. S. Machinery Company contained in said petition.

Dated this 29 day of March, 1946.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Mar. 29, 1946.

[Endorsed]: Filed Feb. 28, 1947. [21]

[Title of District Court and Cause]

AMENDED PETITION FOR ORDER TO
SHOW CAUSE

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy for the Above-Entitled Bankrupt Estate:

The verified petition of William I. Heffron respectfully represents to the Court as follows:

I.

That he is the duly appointed, qualified and acting Trustee for the estate of the above-named bankrupt.

II.

That heretofore, and while your petitioner was the duly appointed, qualified and acting Receiver herein, he caused a petition for order to show cause and restraining order to be filed in the proceedings herein, and had an order to show cause and restraining order issued thereon on the 1st day of March, 1946. That said order to show cause and restraining order was directed against the U. S. Machinery Company, and Clyde W. Henry, its agent, or any of its other representatives, attorneys or servants, against J. T. Evans, against Pete D'e [22] Michilos, and against Joe W. Zwing, Sheriff of Calaveras County, State of California; that since the filing of said petition, and while the said order to show cause issued thereon was pending before this Court and certain hearings had with respect thereto, that your Trustee has come into possession of certain facts and evidence which your Trustee desires to incorporate as an amendment to

the petition and order to show cause; that your Trustee accordingly amends the said petition for order to show cause and restraining order by adding thereto the following, to wit:

(1) That your Trustee has been informed and believes, and therefore alleges, that the said conditional sales contract dated and executed on November 10, 1944, covering the following described property, to wit:

- 1 - Trommel, complete as inspected, including trunnions, chain, sprocket and thrust roller,
- 1 - 100 ft. conveyor, 24", complete with belt
- 1 - Byron Jackson Pump and motor
- 1 - 3-tooth Rooter

was not recorded by the parties to said contract until the 18th day of December, 1944, a period of approximately thirty-eight (38) days after the execution thereof, and that said recordation was made only in Calaveras County, in the State of California, and not in the counties of San Francisco or Los Angeles, being the principal places of business of the U. S. Machinery Company and of the above-named bankrupt. That the said contract, by virtue of the foregoing facts, was invalid and void and of no force and effect as to the creditors and the Trustee of this estate pursuant to the provisions of Section 2980 of the Civil Code of the State of California. That certain creditors of the above named bankrupt had no actual knowledge of the said contract at the time they became creditors of the bankrupt while the said property was in the possession of said bankrupt.

(2) That your Trustee has been informed and believes, and therefore alleges, that the said conditional sales con-

tract, dated and executed on November 10, 1944, covering the following described pro- [23] perty, to wit:

1 – 60 Caterpillar Tractor No. PA3361, with 10 ft. dozer blade.

was not recorded by the parties to said contract until the 18th day of December, 1944, a period of approximately thirty-eight (38) days after the execution thereof, and that said recordation was made only in Calaveras County, in the State of California, and not in the counties of San Francisco or Los Angeles, being the principal places of business of the U. S. Machinery Company and of the above-named bankrupt. That said contract, by virtue of the foregoing facts, was invalid and void and of no force and effect as to the creditors and the Trustee of this estate pursuant to the provisions of Section 2980 of the Civil Code of the State of California. That certain creditors of the above named bankrupt had no actual knowledge of the said contract at the time they became creditors of the bankrupt while the said property was in the possession of said bankrupt.

III.

That your Trustee has been informed and believes, and therefore alleges, that all of the equipment hereinabove referred to in paragraph II, sub-paragraphs (1) and (2) thereof, excepting one 3-tooth Rooter, was in possession and on the leasehold property of the above-named bankrupt on the date of the filing of the original petition in bankruptcy herein, to wit: on February 25, 1946. That your petitioner has further been informed and believes, and therefore alleges, that on or about said date, certain of said equipment was removed from the leasehold premises of the above named bankrupt by the U. S. Machinery

Company, its agent or representatives, or a certain one Pete D'e Michilos. That your petitioner is further informed and believes, and therefore alleges, that the said Pete D'e Michilos had no right, title or interest in *and* said property other than a purported bill of sale obtained by him from the U. S. Machinery Company. [24]

IV.

That your petitioner is further informed and believes, and therefore alleges, that two certain claim and delivery actions were filed against the above-named bankrupt by the U. S. Machinery Company on the 21st day of February, 1946. That in said complaints the said U. S. Machinery Company, however, alleged that they were the owners of all of the above described property set forth in sub-paragraphs (1) and (2) of Paragraph II hereof. That said allegations were made by reason of the purported and invalid conditional sales contracts as hereinabove referred to.

V.

That your petitioner is further informed and believes, and therefore alleges, that the said claim of ownership to the above entitled equipment by the said U. S. Machinery Company, as well as by the said Pete D'e Michilos, is merely colorable, and that at the time of this bankruptcy the said above-named bankrupt was possessed of all of those certain goods, wares and merchandise hereinabove set forth, consisting of mining machinery and equipment used for mining purposes upon its leasehold premises at McSorley Ranch, near Mokelumne Hills, California. That your Trustee, under and by virtue of the provisions of the Bankruptcy Act, is the owner and entitled to possession of said property.

VI.

That your petitioner has made demand upon the U. S. Machinery Company and upon Pete D'e Michilos to return all of the machinery and equipment that they have taken from said property, but they have failed to deliver the said property to your Trustee and wrongfully retain possession thereof without color of right.

Wherefore, your petitioner prays that the petition for order to show cause and restraining order heretofore filed as hereinabove referred to be amended as hereinabove set forth, and that an order be made and entered herein authorizing the amendment as herein set forth, and that upon the hearing had before this Court pursuant [25] to the order to show cause and restraining order heretofore issued and served upon the U. S. Machinery Company and Pete D'e Michilos, that the Court make and enter its order adjudging and decreeing that the said U. S. Machinery Company and Pete D'e Michilos have no right, title, claim or interest in and to the machinery and equipment as hereinabove referred to, and that the Trustee herein is the owner and entitled to possession thereof under and by virtue of the provisions of the Bankruptcy Act; and that the Court further adjudge and decree that the purported conditional sales contracts as hereinabove referred to are invalid and void as to the creditors and to the Trustee of this estate, and why a further order should not be made and entered herein ordering and directing the U. S. Machinery Company and Pete D'e Michilos to forthwith turn over, surrender and deliver to the Trustee all of the machinery and equipment heretofore removed by said parties from the property of the above-named bankrupt as hereinabove set forth. Your

Trustee further prays for such other and further relief as may be proper and just in the premises.

WILLIAM I. HEFFRON

Trustee

GEORGE T. GOGGIN

Attorney for Trustee [26]

[Verified.]

[Endorsed]: Filed Apr. 9, 1946.

[Endorsed]: Filed Feb. 28, 1947. [27]

[Title of District Court and Cause]

MEMORANDUM OF OPINION AND DIRECTION
FOR FURTHER HEARING

An order to show cause was issued upon the verified petition of the Receiver, William I. Heffron, requiring the U. S. Machinery Company, and Clyde W. Henry, J. T. Evans, Pete De Michelis, and Joe W. Zwinge, Sheriff of Calaveras County, State of California, to show cause why an order should not be made directing the said Sheriff to release certain mining machinery and equipment. The said order restrained the U. S. Machinery Company and Clyde W. Henry, and the said De Michelis, J. T. Evans and Joe W. Zwinge from removing, selling or transferring the said property.

Thereafter, the said William I. Heffron, Receiver, became Trustee and continued the said proceeding as Trustee.

The U. S. Machinery Company filed a verified answer in which it alleged (Par. III, line 23):

“Respondent alleges that there is a balance due from said bankrupt under agreement of lease covering the personal property in said petition described [28] of \$2,472.65 as of the 21st day of February, 1946, plus interest from said date, plus the sum of \$1,888.90 incurred and expended in the enforcement of said lease and the repossession of said property, including attorney’s fees, plus attorney’s fees and costs incurred herein, to wit, \$1,000.00.”

The said U. S. Machinery Company likewise filed an independent “Petition to Reclaim Property” in which it alleges (Par. III, page 2, line 5):

“That on or about the 10th day of November, 1944, your petitioner and the bankrupt above-named entered into a written agreement of lease in words and figures as follows:

(There is then set forth in full the contract covering the 60 Caterpillar Tractor No. PA-3361, with 10 ft. dozer blade.)

Paragraph IV sets forth the making of the contract on the same day covering

- “1 – Trommel, complete as inspected, including trunnions, chain, sprocket and thrust roller
- 1 – 100 ft. conveyor, 24”, complete with belt
- 1 – Byron Jackson pump and motor
- 1 – 3-tooth Rooter.”

The said Petition further recites that on February 21, 1946, the said U. S. Machinery Co., as Plaintiff, filed claim and delivery actions on the two said contracts in the Superior Court of Calaveras County. The said Petition thereupon prays that the Trustee be ordered to release the property which remains in his possession and that the Petitioner recover by way of attorney's fees and court costs the sum of approximately \$2,500.00.

An order to show cause was issued thereon against the said William I. Heffron as Receiver and Trustee. [29]

The Trustee filed an amended petition for order to show cause in which he alleged that the said contracts were executed on November 10th, 1944, and were recorded in Calaveras County on December 18, 1944, and that the contracts were invalid and void because they were not also recorded in the counties of San Francisco and Los Angeles, and because they were not recorded within twenty days following execution under Section 2980 of the Civil Code of the State of California.

The said proceedings initiated by the Receiver and the Trustee, and the petition in reclamation of the U. S. Machinery Company were consolidated and heard together.

The personal property with which we are here concerned is "equipment and machinery used for mining purposes" and under Section 2980 of the Civil Code, the contract

"must be acknowledged, or proved and certified, and must be recorded within twenty days after its execution in the office of the Recorder of the county where the buyer -- the lessee or bailee -- resides at the time he executes such contract; -- and a con-

tract of conditional sale of equipment and machinery used or to be used for mining purposes shall also be recorded in every case in the county where the property is situated, otherwise, it shall be void as to the lien or interest of the seller -- against those having no actual knowledge of the contract, lease, or bailment agreement, who became creditors of the buyer -- the lessee or bailee."

The U. S. Machinery Company alleges in both its petition in reclamation and answer that the contracts were entered into on or about November 10, 1944.

Likewise, in its verified complaints in its two claim and delivery actions (Trustee's Exhibit 8) the same date is set forth with the allegation that on or about said date the equipment was delivered [30] to the defendants.

The two contracts, at the foot thereof, show an endorsement,

"Accepted QUARTZ CRYSTAL PRODUCTS CO.

Raymond I. Biggy

James F. Collins

John W. Buol

Dated November 10, 1944."

Mr. Henry testified in part as follows:

"I had put the pressure on the Sacramento office to have this contract drawn right and have it recorded because it had come to my attention that this outfit was not too reliable. I had been told by some of the dealers that it was not too good."

and, with respect to the De Michelis deal, he testified:

“I had requested Mr. De Michelis not to remove the equipment immediately. In fact, I called him after Mr. Biggy was in my office and Mr. Biggy said he would contact Mr. De Michelis and try to make a deal with him. — I believe \$4,750.00 was mentioned as the amount Mr. De Michelis would take to leave the whole equipment there and get his equipment somewhere else. — When Mr. Biggy did not contact Mr. De Michelis, Mr. De Michelis notified me he would have to have the equipment and would hold me responsible to go ahead and deliver it to him.”

and with respect to his original conversation with De Michelis, when the bill of sale was given on January 7th, Mr. Henry testified:

“I showed Mr. De Michelis the contract we had with the Quartz Products Co. and I also showed him a wire from Mr. Biggy, that Mr. Biggy had given up the property.”

(The only telegram introduced in evidence was [31] Trustee's Exhibit 9, dated January, 1946, wherein Biggy informed Henry that he would be in to take up the obligation on Saturday. Biggy denied that he had ever “given up” the property.)

— — “I cannot say, but I think I promised that he could have prompt delivery because it was our equipment. — I gave him a bill of sale as a guaranty that the equipment was mine and that I would make delivery to him — I also explained to him that that was the contract and should there be any

delay that I would not want to be held responsible for it and he acquiesced to that. — I didn't want to obligate ourselves."

(Question: "and you could give back the \$3750?")

"That is correct."

Mr. Henry, of the United States Machinery Co., although he verified ~~to~~ said complaints, petitions and answer, now states that the contracts were not actually

4

signed by him until December 1~~2~~, 1944. The tractor and dozer blade were delivered on September 21, 1944. The down payment as required by the contract was made in several payments; the last being a check of \$8.24, dated Nov. 8, 1944, (Trustee's Exhibit 3) cashed on Nov. 10, 1944, the date the contract was prepared by the United States Machinery Co. The first monthly payment of \$193.75 was paid on December 9, 1944.

The property covered by the other contract was delivered in October and November (all by November 21, except a few minor items). The contract was likewise made out on November 10, 1944 and the check of November 18th for \$311.30 (Trustee's Exhibit 3) is marked "Bal. \$311.30, or initial contract payment of \$1,245.32—11/10/44."

Counsel for the petitioner in reclamation, in his presentation of the matter, informed the Court that under the existing regula- [32] tions that it was necessary that there be a one-third down payment on the contract. If this is the reason for delaying the contracts, it appears that the required full down payments were made on No-

vember 8 and November 18 respectively; after those dates there was no further reason for deferring the execution of the contracts.

While the contracts are referred to as "leases", it appears that the sales taxes in the amounts of \$62.50 and \$91.12, respectively, were added into the contracts.

There is a dispute herein as to the date of the "execution" of the contract as that term is used in Section 2980 of the Civil Code. Insofar as the bankrupt copartnership is concerned, it was executed by Biggy on November 10th and by the other two copartners on November 14th. Biggy testified that he mailed the contract on the evening of the same day to the U. S. Machinery Co. at its office at Sacramento, California. Mr. Henry states that his office did not inform him that the contract had been received back from the bankrupt copartnership until a day or so prior to December 14th, and when he got the said notice he went to Sacramento, signed the contract on December 14th and caused it to be recorded on December 18th in Calaveras County.

The evidence does not show that during this long interval there was any call upon the copartnership for the executed contract.

The invoices (Trustee's Exhibits 4 and 5) are dated October 4, 1944 and are marked "Terms—Lease Contract". The contracts were prepared on November 10th. The property under the second contract was delivered,

some

some ~~time~~ prior to the contract, and [^] a few days thereafter; on November 18th, full down payment was made on the second contract.

I determine that the contract was "executed" not later than November 18th, 1944, and it was therefore not recorded until December 18th, 1944, and under Section 2980 of the Civil Code, it was void as to the then existing creditors of the copartnership, and therefore [33] void as to the Trustee herein.

The Certificate of Business (fictitious firm name) produced by the U. S. Machinery Co. (Respondent's Exhibit 1) shows that the address of the three general partners was:

Raymond I. Biggy,
1304 Alameda Street,
Monrovia, California.

John W. Buol,
3625 Falcon Avenue,
Long Beach, California.

James F. Collins,
443 Orange Avenue,
Long Beach, California.

At the hearing I indicated that I was taking the view that the "residence" of the buyer was Calaveras County. At the continued hearing this question of residence may be considered further. *

The two contracts had been in default since April, 1945. Biggy sent a telegram to Mr. Henry stating that he would be in to "take up" the Quartz Crystal Production obligation on Saturday. (January 6, 1946.) However, he was delayed a day or so and had difficulty locating Mr. Henry at his San Francisco address owing to the fact that Mr. Henry had moved and he could not locate the forwarding address. When Mr. Biggy con-

tacted Mr. Henry on the following Tuesday (January 8, 1946), Mr. Henry informed him that he had sold parts of the property to a Pete De Michelis for \$3700.00, and that he could get it back by paying De Michelis \$4700.00. Mr. Biggy testified that Mr. Henry stated to him he had sold the property to De Michelis with the understanding that he might not be able to make delivery of the said property.

The bill of sale to De Michelis, dated January 7, 1946, covered

1 Trommel with trunnions, chain, sprocket and thrust roller; [34]

1 24-inch Conveyer, complete with belt;

1 60 Caterpillar Tractor No. PA3361 with 10 ft. dozer blade.

It appears that De Michelis tried, without success, to the

get [^] a property free from the Sheriff of Calaveras County, who was holding the equipment under an attachment in an action against the bankrupt, and that the Sheriff informed him on the afternoon of February 25th that by telephone or telegram he had received notice of the filing of the bankruptcy, but that he, De Michelis, had not received any "official notice". The bankruptcy proceeding was filed on February 25, 1946, and on the evening of the same day De Michelis removed the tractor and parts of the trommel.

If the respondents desire a finding that any property was removed prior to such notice, they must, at the next hearing, produce further evidence including the testimony or deposition of the Sheriff of Calaveras County.

The United States Machinery Company, on February 21, 1946, filed the claim and delivery actions in which it alleges that it was the owner of and entitled to possession of the property covered by the two contracts; that under the tractor contract \$849.67 was "due and unpaid", and under the trommel contract, \$1628.48 was "due and payable". In the said actions the said plaintiff prayed judgment for recovery of possession or the sums of \$2500.00 and \$3645.00, respectively, the value thereof.

While the contracts provide that "time is of the essence of this lease", it is my view that the bankrupt estate should not be deprived of this property; it has a value of from \$6000.00 to \$9500.00.

In view of the circumstances as related herein, even though the contracts were valid, the equity powers of the bankruptcy Court are adequate to protect the creditors and permit a retention of the property provided the U. S. Machinery Company is repaid the amount due it with interest to date of payment. The question of the allow- [35] ance of costs will be determined at the continued hearing.

At the next hearing, the Trustee must elect to affirm or reject the sale made to De Michelis as that will effect the final result herein. The title to the property which is under the two claim and delivery actions has not heretofore been adjudicated and possession only has been released to the purported owner, the U. S. Machinery Company.

While I am not at this time indicating a finding on the question as to what exact hour on the date of bankruptcy the property was taken from the Sheriff, it is my present impression that all, or at least a majority was

removed after actual notice of the filing of the bankruptcy.

It appears that the bankrupt is entitled to a credit upon the trommel, conveyor and pump contract. The contract calls for a "Byron Jackson" pump; instead, an agriculture pump was delivered. The Trustee contends that therefore the agriculture pump is not under the contract, but I hold that the substitution was agreed upon and the pump as delivered is under the contract. However, the pump was not in working condition, and the bankrupt claims that it should have a credit of \$161.07 for repairs and necessary work upon it to make it perform the work which the U. S. Machinery agreed it would perform. The U. S. Machinery contends that it was not required to give the said credit, and further, that the reasonable or actual cost of repairs was a lesser amount. I find that a credit of \$110.00 should be credited and allowed on the balance due on the said contract.

This matter is therefore restored to the calendar for further hearing on the 13th day of June, 1946, at the hour of 2:00 P. M., at which time all parties may produce such further evidence as they desire in the premises.

Dated this 29 day of May, 1946.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed May 29, 1946.

[Endorsed]: Filed Feb. 28, 1947. [36]

[Title of District Court and Cause]

ORDER TO TAKE TESTIMONY OF
PETE DE MICHELIS AND JOE W. ZWINGE

It appearing that the Trustee herein by and through his attorney, George T. Goggin, and the respondent, U. S. Machinery Company, by and through its attorney, Charles A. Thomasset having appeared before the undersigned in open Court and having stipulated that the testimony of Pete de Michelis, a witness on behalf of U. S. Machinery Company and Joe W. Zwinge, Sheriff of Calaveras County, California, a witness on behalf of the Trustee might be taken in the above entitled matter upon written interrogatories and cross interrogatories,

And it appearing that the said witnesses reside in San Francisco, California, and in San Andreas, California, respectively, and good cause appearing therefor,

It Is Ordered That the testimony of Pete de Michelis be taken before any Notary Public or other Officer authorized by law to administer oaths in the City and County of San Francisco, [37] California, upon direct interrogatories and cross interrogatories attached hereto.

It Is Further Ordered That the testimony of Joe W. Zwinge, Sheriff of Calaveras County, California, be taken before any Notary Public or other Officer authorized by law to administer oaths in the Town of San Andreas, California, upon the direct interrogatories and cross interrogatories attached hereto.

It Is Further Ordered That the answers of the said witnesses to the said interrogatories be written verbatim by the Officer before whom the said testimony is taken and that thereafter the said Officer transmit this Order

together with the attached interrogatories and the answers thereto to the undersigned addressed to him at 312 North Spring Street, Los Angeles 12, California, duly signed by the said witnesses and certified by the Officer before whom the testimony is taken.

Dated: July 12, 1946.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Written]: Duplicate Original

[Endorsed]: Filed Jul. 12, 1946.

[Endorsed]: Filed Feb. 28, 1947. [38]

[Title of District Court and Cause]

ANSWERS TO INTERROGATORIES
PROPOUNDED TO PETER DE MICHELIS ON
BEHALF OF U. S. MACHINERY COMPANY

State of California

City and County of San Francisco—ss.

Peter De Michelis, being first duly sworn, deposes and says:

That as and for answers to the interrogatories propounded to affiant, I hereby give answers to same as follows:

1st Interrogatory: State your name and address.

Answer: Peter De Michelis, 142 Oxford Street, San Francisco, California.

2nd Interrogatory: State the date when U. S. Machinery Company executed a bill of sale in your favor for certain machinery.

Answer: The bills of sale were executed January 7, 1946, and delivered on that day; on my later request, the bills [39] of sale were notarized February 4, 1946.

3rd Interrogatory: Describe the machinery which was the subject of that bill of sale.

Answer: 1—Trommel, including trunnions, chain, sprocket, and thrust roller. 1—100 ft. conveyor, 24", complete with belt. 1—60 Caterpillar Tractor No. PA-361, with 10 ft. dozer blade.

4th Interrogatory: Did you at that time or thereafter ascertain where that machinery was located?

Answer: I ascertained where the machinery was located prior to my purchase.

5th Interrogatory: If your answer to the last interrogatory be in the affirmative, state where the machinery in question was located.

Answer: On the property of the Quartz Crystal Products Co., between San Andreas and Mokelumne Hill.

6th Interrogatory: What did you thereafter do, if anything, with reference to recovering or taking over possession of that machinery.

Answer: Approximately two days after purchasing the equipment from Mr. Henry, Mr. Henry telephoned to me on behalf of Mr. Biggy, stating that Mr. Biggy wanted to buy the machinery from me and had the cash to pay for it. I told Mr. Henry that I had bought the

equipment because I needed it badly, but that if the machinery could be replaced something could be worked out to the advantage of both parties. I was then informed that Mr. Biggy would call to see me, but he failed to do so. I first attempted to obtain possession about January 18, 1946. At that time, J. Barron and I met the caretaker, Mr. Manchini, who gave me a key to get onto the property, but on entering the grounds, I saw the notice posted informing me the machinery was attached—the attachment [40] itemized various pieces of equipment but did not specifically describe the equipment purchased by me from U. S. Machinery, though covered by the phrase, "Any other personal property, equipment or machinery upon said mining ground." I then proceeded to file a third-party claim about February 13, 1946, and had the machinery released to me from the attachment five days later. J. Barron and I then attempted to take possession but found a new chain and lock on the gate over the one that I had a key for. Mr. Manchini refused to give me a key for the second lock, and he stated that he was instructed by Mr. Biggy that if the equipment had not been removed to stop me from moving it. I then went to the U. S. Machinery in San Francisco and demanded the delivery of the machinery, having purchased the machinery in good faith. Mr. Clyde Henry then stated that he would stand behind the sale and hired me as his agent, agreeing to pay all the expenses, and told me to stay on the job until the machinery was recovered. Then on February 21, 1946, a com-

plaint for claim and delivery was filed, bond posted, and the sheriff instructed to take possession. Mr. Manchini was given three days' notice. As no action was taken by Mr. Manchini, the equipment was released to me by the sheriff on the morning of February 25, 1946 in the presence of Mr. Manchini. I immediately started moving the equipment. On the following day about 5:00 p. m., the deputy sheriff appeared on the grounds, stating that the sheriff's office had received a telegram from Biggy stating that he was filing bankruptcy. I asked this deputy sheriff if I should stop moving the equipment and was told that this was not an official order and that the sheriff's [41] office would not recognize it as such. By this time, I had removed the Caterpillar tractor and miscellaneous parts. I continued to dismantle the equipment preparatory to moving it. When the deputy sheriff appeared on the property with the restraining order on or about March 1, 1946, I then turned over the key to the sheriff on his demand and I have moved nothing since then. J. Barron and myself were present all the time, and Mr. C. Roe and Eugene Smith were with us part of the time. This, to the best of my knowledge, is what happened in this situation.

7th Interrogatory: If you were subjected to any expenses in connection with, and if, in addition, you incurred any liability with reference to, securing possession of that machinery, state the nature, extent and amount of those expenses and liabilities.

Answer: Due to my not being able to get delivery of the equipment purchased from the U. S. Machinery Company, my costs were many times greater than the price I paid for the machinery, including such items as demurrage on the property, rental of other equipment, idle labor and losses from not operating the business we had contemplated. Mr. Henry informed me the only matters that would be allowed would be those costs directly connected with recovering the equipment. I did not expect any further trouble after the sheriff released the equipment to me after I had filed my third-party claim, and therefore did not keep accurate records of every move I made by the day or hour, nor a too accurate record of the expenses. However, the expenses, as best as I can figure them out, incurred between January 7 and February 25, 1946, were as follows: [42]

| | |
|--|----------|
| 1 man @ \$50.00 per week | \$300.00 |
| 1 Chevrolet Truck @ \$75.00 per week | 450.00 |
| 1 Studebaker Pick-Up Truck @ \$25.00 per week | 150.00 |
| 10 trips from Railroad Flat to San Andreas, 440 mi. @ 10¢ per mi. | 44.00 |
| 15 telephone calls | 18.63 |
| 16 trips from Railroad Flat to San Francisco, 4608 mi. @ 10¢ per mi. | 460.80 |
| Notary fees | 3.00 |
| Expense account—Mr. De Michelis | 50.00 |
| Peter De Michelis, 5 weeks @ \$100.00 per week | 500.00 |

As and for Answer to Cross-Interrogatories, I hereby give answers to same as follows:

1st Interrogatory: State the dates, as well as the time of day and the persons present, in connection with what you did with reference to recovering or taking over possession of the machinery described in the bill of sale from U. S. Machinery Company.

Answer: Answered in 6th Interrogatory.

2nd Interrogatory: State what documents or receipts, if any that you have evidencing the payment of any expenses by you in attempting to secure possession of the machinery.

Answer: Due to the type of expenses incurred, I have no receipts for substantial expenses. The trucks belonged to me, for which I should be compensated at rental rates as they could have been used elsewhere during this period of time.

PETER DE MICHELIS

Subscribed and sworn to before me, this 20th day of July, 1946.

(Seal)

ALICE C. MORSE

Notary Public in and for the City and County of
San Francisco, State of California

[Endorsed]: Filed Jul. 6, 1946.

[Endorsed]: Filed Feb. 28, 1947. [43]

[Title of District Court and Cause]

MEMORANDUM OPINION

The voluntary petition of the above bankrupt was filed February 25, 1946 at 2:40 P. M., and on the same date an order of adjudication was made. On March 1 an order to show cause was issued upon the verified petition of William I. Heffron, Receiver, and thereupon the U. S. Machinery Company, a California corporation, appeared before the court with its verified answer thereto and its independent Petition to Reclaim Property. The said controversy has been in process of litigation since that date.

On May 29, 1946, I made a Memorandum of Opinion and thereupon permitted the parties to have further hearings in the matter. The hearings have been concluded and this long-drawn out controversy has been finally submitted to the Referee for determination. I will not attempt to reiterate the many matters covered in my former Memorandum of Opinion and this Memorandum may be considered a supplement thereto. During the litigation William I. Heffron, Receiver, has succeeded himself as Trustee and has carried on the litigation.

The question involved concerns the rights of the parties under two certain "Agreements to Lease" by which certain mining property and equipment was delivered by U. S. Machinery Company to the debtor. As indicated in my former Opinion, these instruments were in fact conditional sales contracts. [44]

Some of the property covered thereby is still at the mine in Calaveras County which is in possession of the said Trustee and some was removed from the property under the purported resale thereof by the U. S. Ma-

chinery Company to one Pete De Michelis. The U. S. Machinery Company maintains that it had the right to dispose of the said portion of the property and it is contending here that it has the present right to receive the remaining portion thereof. The Trustee contends to the contrary on both points and contends that the said contracts did not provide security protection or retention of title to the said U. S. Machinery Company. And further, if such security or retention of title was so provided by the contracts that, by virtue of credits asserted by the said Trustee, the unpaid balance thereon was paid and the U. S. Machinery Company has no further interest therein.

The Trustee contends that under Section 2980 of the Civil Code that the agreements should have been recorded within twenty days after execution in the office of the recorder of the county where the buyer (lessee) resided at the date he executed the agreements, and further, that they also should have been recorded in the County where the property was situated, and he contends that the said section was not so complied with.

The evidence shows that the agreements bear date of November 10, 1944 (Trustee's Exhibits 1 and 2). The U. S. Machinery Company alleges in both its Petition to Reclaim and its Answer that the agreements were "entered into on or about November 10, 1944." The agreements were recorded December 18, 1944, in the County Recorder's Office, County of Calaveras, State of California. They were not recorded in Los Angeles County where the copartners, constituting the bankrupt, resided. However, for the purposes of the within controversy I have determined that Calaveras County was the "resi-

dence" of the buyer, that is, the said copartnership. The evidence is disputed as to the date of execution. [45]

The tractor and dozer blade were delivered on September 21, 1944. The down payment as required by the contract was made in several payments, the last being a check of \$8.28, dated November 8, 1944 (Trustee's Exhibit 3) cashed on November 10, 1944. The first monthly payment of \$193.75 was paid on December 9, 1944. The property covered by the other contract was delivered in October and November and the check of November 18 for \$311.30 (Trustee's Exhibit 3) is marked "Bal. \$311.30 on initial contract payment of \$1,245.32—11/10/44."

Counsel for the petition in reclamation, in his presentation of the matter, informed the Court that under the existing regulations that it was necessary that there be a one-third down payment on the contract. Mr. Biggy, one of the copartners, testified that he executed the agreements on November 10 and that the other two partners executed the same on November 14. Biggy testified that he mailed the said agreements on the evening of the same day to the U. S. Machinery Company at its office at Sacramento. It appears that there were no notices given to the said buyers that the U. S. Machinery Company had not promptly and in due course received the said agreements through the mail, and the first of the monthly payments were promptly made on the agreements. Mr. Henry, however, testified that from his office in San Francisco he contacted his office in Sacramento on a number of occasions in connection with the agreements, and that his Sacramento office did not inform him that the executed agreements had been received from the purchaser until a day or so prior to December 12. He there-

upon went to Sacramento, executed the said agreements, and caused the same to be recorded December 18, 1944 in Calaveras County.

The question is: When were the said agreements executed? Having in mind the specific requirements of Section 2980 of the Civil Code, the first portion thereof requires the recording within [46] twenty days after execution in the office of the county recorder where the buyer resides at the time he executed such contract, while the latter portion of the section recites that the same "shall also be recorded in every case in the county where the property is situated otherwise, it shall be void. . . ." Even though there may be a question as to whether or not the second recording must be within twenty days to be within the terms of the said statute, it would appear that in any event it should be promptly recorded in the same manner as a chattel mortgage, to be valid and enforceable as to existing creditors. Why the U. S. Machinery Company did not attach its signature to the agreements before December 12 is not clear from the evidence. It had received the down payments as indicated and it had received the first monthly payments on the agreements, yet it now contends that it did not "execute" the agreements within the terms of the said statute until December 12. The purpose of the statute is to give notice to the public, investors, creditors, and others who may deal with the mine operator, by recording the instrument which shows that the mine operator does not completely own the equipment in his possession. The agreements were valid as between the parties even though not recorded. As to them, their agreements were made when the property was delivered and the required down payment was made. That time

might well be considered as the time of "execution" of the agreement. In fact, the U. S. Machinery Company alleges in both its verified Petition to Reclaim and its Answer that the Agreements were "entered into on or about November 10, 1944." If the seller delivered the property and received the agreed consideration, could he for any reason wait for one year before securing the buyer's signature to the contract and placing his own thereon, and then, within the twenty days, record the contract and maintain that there was a proper recording under the statute? I think not. [47]

I must therefore determine that the agreements, under the contemplation of the said statute, were executed more than twenty days prior to the date of recording on December 18, 1944, and since the bankrupt had creditors on November 10, 1944, who are still creditors at the date of bankruptcy herein, the Trustee therefore may insist on the invalidity of the said agreements.

The Trustee makes a further contention that because of the resale by the U. S. Machinery Company of a portion of the said property, that there is no sum owing to the said seller. The facts in connection therewith are as follows: The agreements had been in default for a number of months when Mr. Biggy sent a telegram to Mr. Henry, owner of the U. S. Machinery Company, stating that he would call upon Mr. Henry at his office in San Francisco to "take up" the Quartz Crystal Products obligation on January 6, 1946. However Mr. Biggy was delayed for a day or so and then had difficulty in locating Mr. Henry at his San Francisco address owing to the fact that Mr. Henry had moved, and he could not locate his forwarding address. Mr. Biggy located Mr. Henry on January 8, 1946. When he called upon him, Mr. Henry informed

him that he had sold portions of the property (one trommel with trunnions, chain, sprocket and thrust roller; one 24 inch conveyor, complete with belt; 1 60 Caterpillar Tract No. PA-3361 with 10 ft. dozer blade) on January 7, 1946 to Pete De Michelis for \$3700.00 Henry informed Biggy that he could get the property back from De Michelis for \$4700.00 or a \$1000 bonus. Biggy testified that Mr. Henry stated that he had sold the property to De Michelis with the understanding that he might not be able to make delivery thereof. No notice of forfeiture of the interests of the bankrupt under the agreements was given by the U. S. Machinery Company prior to the attempted sale to De Michelis. The property remained in the bankrupt's possession. It appears that De Michelis tried, without success, to get the property re- [48] leased from the said Sheriff who was holding the property under an attachment in an action which had been brought against the bankrupt.

Thereafter, and on February 21, 1946, the U. S. Machinery Company filed the claim and delivery actions in which it alleges that on that date it was the owner of and entitled to possession of all of the property covered by the two agreements, and that there was then due under the tractor contract \$849.67 and under the trommel contract \$1628.48. In other words, that there was a balance due on the said contracts of \$2478.15. Although at that very time the said U. S. Machinery Company had in its possession the \$3700 paid by De Michelis on January 7, which sale covered, as aforesaid, only a portion of the property. The result being that not only were the contracts paid but the said seller was holding a surplus of \$1221.85. No trial was had upon the said actions and

no order has been made thereon. The said plaintiff is here before the Bankruptcy Court seeking the same relief.

In the said actions, the said U. S. Machinery Company prayed for judgment for recovery of possession, or the sum of \$2500 and \$3645 respectively, or a total of \$6145.

From the testimony herein, I conclude that the value of the property at the date of bankruptcy was from \$6000 to \$9500. The equity power of the Bankruptcy Court should be and is adequate to protect the bankrupt under such a situation as we find here. Forfeitures are abhorred, and in bankruptcy they are indeed the exception to the rule, and relief is given to the Trustee in Bankruptcy who desires to pay in full the balance due upon a contract and retain the property and equity therein for the benefit of the creditors, even though the contract is past due and in default. The same situation should prevail here.

It further appears that no consideration should be given to the costs incurred by the U. S. Machinery Co. in the said [49] actions or its attorney fees in connection with the said actions or the present hearings in the amount of \$500.00 for each action or any amount whatsoever.

In my Memorandum of Opinion of May 29, I found that the bankrupt should have a credit because of repairs and work performed on a portion of the property sold in the amount of \$110.00. There was therefore a balance of \$2368.15 owing to the U. S. Machinery Company and since the Trustee has elected to adopt the said sale made to the said De Michelis, the result is that the U. S. Machinery Company has received its balance of \$2368.15 and is holding for the Trustee herein the amount of \$1331.85.

Therefore the said U. S. Machinery Company has no right, title, interest, lien or claim upon any of the balance of the said property still in possession of the Trustee. The Trustee should release to the said Pete De Michelis the remaining portions of the said property so sold to the said De Michelis, to wit:

1 Trommel with trunnions, chain, sprocket and thrust roller; 1 24 inch Conveyor, complete with belt; 1 60 Caterpillar tractor No. PA 3361 with 10 ft. dozer blade.

as may be still in the possession of the Trustee.

A question exists as to what, if any, property was taken from the mine by De Michelis. However, since the Trustee has adopted the sale to De Michelis this point is of little consequence here.

The Trustee is entitled to an order that the property, other than that sold to De Michelis, is an asset of the bankrupt estate and the U. S. Machinery Company has no right, title, interest or security thereon, and that the Trustee is entitled to judgment against the U. S. Machinery Company in the amount of \$1331.85.

Counsel for the Trustee is directed to prepare findings and order in accordance with the views expressed herein.

Dated: November 15, 1946.

HUBERT F. LAUGHARN
Referee in Bankruptcy

[Endorsed]: Filed Nov. 15, 1946.

[Endorsed]: Filed Feb. 28, 1947. [51]

[Title of District Court and Cause]

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER RE U. S. MACHINERY COM-
PANY, ET AL.

The petition for order to show cause and restraining order filed herein by William I. Heffron, as Receiver for the above-entitled bankrupt, and the amended petition for order to show cause in connection therewith filed subsequently by the said William I. Heffron, as Trustee for the above-entitled bankrupt estate, while the original petition and order to show cause and answer were pending before the Court, and certain hearings had with respect thereto, and the orders to show cause and restraining orders issued thereon against the U. S. Machinery Company, and Clyde W. Henry, its agent, or any of its other representatives, attorneys or servants; J. T. Evans, Pete De Michelis, and Joe W. Zwinge, Sheriff of Calaveras County, State of California, and the petition to reclaim property filed by the U. S. Machinery Company, and the order to show cause issued thereon directed against William I. Heffron, and the answer to the petition for order to show cause and restraining order filed by the U. S. Machinery Company to the petition of William I. Heffron, as Receiver, all coming regularly on [52] for hearing before this Court on various dates, commencing on the 18th day of March, 1946, at the hour of 10:00 o'clock A. M. thereof, and the Receiver and Trustee being represented by his attorney, George T. Goggin, and the U. S. Machinery Company appearing by its attorney, Charles A. Thomasset, and evidence having been introduced, both oral and documentary, and the matter having been continued from time to time there-

after with additional evidence being introduced, and the Court having taken said matters under submission, makes the following findings of fact, conclusions of law, and order :

FINDINGS OF FACT

1. That the bankrupt, during all of the period of time hereinafter referred to, was engaged in the development, maintenance and operation of a mine located in Calaveras County from which was extracted quartz, crystals, and other minerals.

2. That the bankrupt heretofore, and during the month of September, 1944, entered into two separate and different oral contracts with the U. S. Machinery Company for the purchase and sale of certain equipment and machinery used or to be used for mining purposes.

(a) That on September 22, 1944, the bankrupt paid to the said U. S. Machinery Company the sum of \$100.00 upon one of the contracts covering the purchase of :

- 1 - Trommel, complete as inspected, including trunnions, chain, sprocket and thrust roller,
- 1 - 100 ft. conveyor, 24", complete with belt,
- 1 - Byron Jackson Pump and Motor,
- 1 - 3-tooth Rooter.

That thereafter, and on November 10, 1944, the oral contract covering the aforementioned personal property was reduced to a written conditional sales agreement by the U. S. Machinery Company for the total [53] purchase price of \$3,645.00, plus sales tax, and on said date the bankrupt paid to the said U. S. Machinery Company the sum of \$834.02. Said contract was signed by Raymond

I. Biggy, one of the partners of said bankrupt on the same date, and that the other two partners signed and executed the same on November 14, 1944. That on the 14th day of November, 1944, said contract was mailed to the U. S. Machinery Company at its office in Sacramento, California. That said contract was recorded by the U. S. Machinery Company on December 18, 1944, in Calaveras County, in the State of California. That delivery of he said equipment was made in two different loads to the mine of the said bankrupt, the last being on the 16th day of November, 1944.

(b) That on the 26th day of September, 1944, the bankrupt paid to the U. S. Machinery Company the sum of \$625.00 covering the purchase of:

- 1 – 60 Caterpillar Tractor No. PA3361, with 10 ft. dozer blade.

and on the 29th day of September, 1944, the said personal property was delivered to the mine of the bankrupt. That thereafter, and on November 10, 1944, the oral contract covering the aforementioned personal property was reduced to a written conditional sales agreement by the U. S. Machinery Company for the total purchase price of \$2,500.00, plus sales tax. That said contract was signed by Raymond I. Biggy, one of the partners of said bankrupt on the same date, and that the other two partners signed and executed the same on November 14, 1944. That on the 14th day of November, 1944, the said contract was mailed to the U. S. Machinery Company at its office in Sacramento, California. That said contract was recorded by the U. S. Machinery Company on December 18, 1944, in Calaveras County, in the State of California.

3. That the said bankrupt had creditors who had no actual knowledge of the said contracts and who became creditors of the said [54] bankrupt while the said property was in the possession of the said bankrupt and before the said contracts were recorded, and who are still creditors with provable claims filed in the bankruptcy proceedings herein.

4. That the total purchase price, together with the sales tax on the personal property covered by the two contracts as aforesaid amounted to \$6,298.62. That payments were made upon said contracts by the bankrupt in various installments, and that there was at the time of the filing of the bankruptcy proceedings herein a sum due the U. S. Machinery Company by the said bankrupt upon the said contracts of \$2,368.15 and no more.

5. That on or about January 8, 1946, the U. S. Machinery Company informed one of the partners of the bankrupt that it had sold portions of the personal property set forth in the said conditional sales contract on January 7, 1946 to one Pete De Michelis for \$3,700.00; said personal property, however, being in the possession and under the control of the said bankrupt. That said U. S. Machinery Company informed the said partner of the bankrupt that it could get the property back from the said Pete De Michelis by the payment of \$4,700.00, or a \$1,000.00 bonus; that the U. S. Machinery Company stated that it had sold the property to De Michelis with the understanding that it might not be able to make delivery thereof. That the said bankrupt was in default on

the payments under the terms of said conditional sales contract at said time. That no notice of forfeiture, however, of the interest of the bankrupt under the said agreements was given by the U. S. Machinery Company prior to the purported and attempted sale to Pete De Michelis. That thereafter the said Pete De Michelis tried without success to get possession of the said property, and on February 21, 1946, the U. S. Machinery Company filed the claim and delivery actions in the Superior Court of the State of California, in and for the County of Calaveras, alleging that on said date it was the owner and entitled to possession of all of the property covered by the two [55] agreements and that there was then due under one of the contracts the sum of \$849.67, and under the other contract the sum of \$1,628.48, although at that very same time the said U. S. Machinery Company had in its possession the sum of \$3,700.00 paid by the said Pete De Michelis on January 7, 1946.

6. That no trial has been had upon the claim and delivery actions filed by the U. S. Machinery Company in the Superior Court as aforesaid. That said U. S. Machinery Company has filed in the proceedings herein a petition to reclaim the said property and has submitted to the jurisdiction of this Court to try the very same issues.

7. That the Trustee for the above-entitled bankrupt estate has elected to adopt the sale made to the said Pete De Michelis for the sum of \$3,700.00; that after the payment of the balance due to the U. S. Machinery Company as aforesaid from the \$3,700.00 in its possession that there is a balance of \$1,331.85 due the Trustee.

CONCLUSIONS OF LAW

From the foregoing findings of fact the Court makes the following conclusions of law:

1. That the said conditional sales contracts are invalid and void as to the Trustee and the creditors of this estate under and by virtue of the provisions of Section 2980 of the Civil Code of the State of California in that the said contracts were not recorded within twenty (20) days after the execution of said contracts by the bankrupt.

ORDER

From the foregoing findings of fact and conclusions of law the Court herein makes the following order, to wit:

It Is Ordered, Adjudged and Decreed that the conditional sales contracts entered into by and between the U. S. Machinery Company and the above-named bankrupt, bearing date of November 10, [56] 1944, covering the hereinabove described personal property, are invalid and void and of no force or effect upon the Trustee or the creditors of this estate.

It Is Further Ordered that the sale heretofore made covering a certain portion of the above described personal property to Pete De Michelis, for the sum of \$3,700.00, be and the same is hereby approved and confirmed.

It Is Further Ordered that from said sum of \$3,700.00 there be paid upon the account of the U. S. Machinery

Company the sum of \$2,368.15 in full and complete payment of the amount due it by the above-named bankrupt, and

It Is Further Ordered that the said U. S. Machinery Company forthwith pay the balance of the \$3,700.00 that it is holding in its account to the Trustee herein amounting to \$1,331.85.

It Is Further Ordered that the U. S. Machinery Company has no right, title, interest, lien or claim upon any of the personal property still in the possession of the Trustee herein.

It Is Further Ordered that the Trustee release to Pete De Michelis any portion of the personal property sold to the said Pete De Michelis that may still be in the possession of the said Trustee.

It Is Further Ordered that J. T. Evans, and Joe W. Zwinge, Sheriff of Calaveras County, State of California, have no right, title, claim or interest in and to any of the assets of the above-entitled bankrupt, and that the said Trustee may sell any and all of said property free and clear.

Dated this 28th day of January, 1947.

HUBERT F. LAUGHARN

Referee in Bankruptcy

[Endorsed]: Filed Jan. 23, 1947.

[Endorsed]: Filed Feb. 28, 1947. [57]

[Title of District Court and Cause]

PETITION FOR REVIEW OF REFEREE'S ORDER

To the Honorable Hubert F. Laugharn, Referee in Bankruptcy:

Your petitioner, U. S. Machinery Company, a California corporation, acting by and through its attorney, respectfully shows:

I.

That on the 28th day of January, 1947, the Honorable Referee above named made an order herein denying the relief sought herein by petitioner as set forth in petitioner's petition for reclamation filed herein on or about March 30, 1946; that by said petition for reclamation petitioner sought possession of certain machinery and equipment leased to the bankrupt above named under two agreements in writing each dated November 10, 1944; that by said order it is decreed that each of the aforesaid agreements is invalid, void and of no force and effect; that the findings of fact upon which said [58] order is based provides that each of said agreements was signed by the above named bankrupt on the 14th day of November, 1944, and recorded on December 18, 1944; that the conclusions of law based upon said findings declares that each of said agreements is invalid and void under the provisions of section 2980 of the Civil Code of the State of California.

II.

That petitioner alleges that each of said agreements was executed on December 14, 1944; and recorded on December 18, 1944, and is valid as to the Trustee herein and the creditors of this estate and that the said order, and the whole thereof, is erroneous and that the Honorable Referee herein erred in refusing to grant the relief prayed for in said petition for reclamation of this petitioner.

Wherefore, petitioner alleges that the court erred in denying the petition of reclamation of U. S. Machinery Company and your petitioner feeling aggrieved because of such order, respectfully prays that it may be reviewed.

CHARLES A. THOMASSET

Attorney for Petitioner

[Endorsed]: Filed Feb. 24, 1947.

[Endorsed]: Filed Feb. 28, 1947. [59]

[TRUSTEE'S EXHIBIT NO. 1]

San Francisco Office

Los Angeles Office

1162 Bryant Street

707 E. 61st Street

Telephone UNderhill 2977

Telephone ADams 11787

Telephone Main 1015

U. S. MACHINERY COMPANY

Mining Machinery – Contractors Equipment – Shop Tools

1800 Twentieth Street

Sacramento, California

Date November 10, 1944

The U. S. Machinery Company, hereinafter referred to as the Lessor, leases to Quartz Crystal Products Co., P. O. Box 4, San Andreas, California, hereinafter referred to as the Lessee, the following machinery and equipment, for use in Calaveras County, State of California, to-wit:

1 – 60 Caterpillar Tractor No. PA3361, with
10 ft. dozer blade.

– –
– –
– –

plus \$62.50 sales-tax,
for the term of nine months at a total rental of \$2500.00 /
of which amount \$818.75 is payable at once, and receipt
whereof is hereby acknowledged by the Lessor; and the
balance of \$1,743.75, payable in nine monthly installments

of \$193.75 each, plus interest, as evidenced by notes of even date herewith.

The intent of this lease agreement is that the Lessor leases certain machinery, as herein specified, to the Lessee; and that this lease shall not be construed as a sale.

It is understood and agreed that the machinery shall at all times, be and remain personal property, notwithstanding the manner of its annexation to realty; and that title to said property shall remain in said Lessor until all of the payments herein provided for are made and all of the conditions and terms hereof fully complied with by said Lessee, whereupon should said Lessee so elect, the said Lessor shall make, execute and deliver to said Lessee a bill-of-sale of said property, and sell to said Lessee the said property for the sum of One Dollar (\$1.00).

The time of delivery named herein is the approximate date, and the Lessor shall not be responsible for delays for non-performance occasioned by strikes, fire or other causes beyond its reasonable control.

The acceptance of the machinery when delivered shall constitute a waiver of all objections to same and also waiver of all claims for damages caused by any delay or any injury in transit. The Lessor shall not be liable under this lease, for any special, indirect or consequential damages. The Lessee agrees to keep the above machinery in good repair.

Rental installments due under this lease are evidenced by promissory notes of even date herewith, but said notes are not received by the Lessor, and shall not be deemed to be, payments under this lease until they have been paid.

Risks of fire or other casualty shall be in the Lessee. He shall at his own cost keep said machinery insured

against fire to the extent of \$2,500.00 with the policy, payable to the Lessor. The partial or total destruction of said property by fire or otherwise shall not release the Lessee from obligation to pay balance of rental, but any amount received by Lessor from an insurance company for fire loss shall be credited on unpaid notes.

In the event of default by Lessee in the performance of this lease, or the failure to pay any of said payments when due, or in the event of bankruptcy of Lessee or the taking of said machinery or any part thereof by any persons other than Lessor, by attachment or other process of law, the Lessor may at its option, enter the property in which the machinery is located and without hindrance, directly or indirectly, on the part of the Lessee, take possession of said machinery or any part thereof, and thereupon the Lessee shall have no further interest in or to said property or any portion thereof, and the amount paid prior to the date of said re-possession shall be retained by the Lessor as rental for the use of said machinery during the time that it has been in the custody of the Lessee. The Lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be incurred by the Lessor to enforce this lease or the payment of said rentals, or to re-possess said property as aforesaid.

All previous communications between the parties hereto, either oral or written, with reference to said machinery or this lease, are hereby superseded and no modification hereof shall be binding upon the parties or either of them unless such modification shall be in writing duly accepted and approved by both parties. There are no representations, understandings or agreements outside of this lease.

Full agreement between the parties hereto is contained herein, and time is of the essence of this lease.

Yours very truly,

U. S. MACHINERY COMPANY

By Clyde Henry

Pres.

Accepted: QUARTZ CRYSTAL PRODUCTS CO.

By Raymond I. Biggy

John W. Buol

James F. Collins

Date Nov. 10/44 [60]

State of California,

County of Sacramento—ss.

On this 12th day of December in the year one thousand nine hundred and forty-four before me.....
.....a Notary Public in and for the County of Sacramento, personally appeared Clyde Henry, known to me to be the President of the corporation that executed the within instrument known to me to be the person whose name is subscribed to the within instrument andduly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

(Seal)

N. W. Hicks

Notary Public in and for the County of Sacramento,
State of California

My Commission Expires 1-11-47

State of California,
County of Los Angeles—ss.

On this 14 day of November, A. D., 1944, before me,
Burke Mathes, a Notary Public in and for said County
and State, personally appeared Raymond I. Biggy, James
F. Collins and John W. Buol, known to me, (or proved to
me on the oath of.....), to be ~~one of the~~
the general
limited
partners of the \wedge partnership that executed the within in-
general
strument, and acknowledged to me that such \wedge partnership
executed the same.

In Witness Whereof, I have hereunto set my hand and
affixed my official seal the day and year in this certificate
first above written.

(Seal)

Burke Mathes

Notary Public in and for said County and State. [61]

Recorded at the Request of U. S. Machinery Co. Dec.
18, 1944 at 51 minutes past 4 o'clock P. M. in Book 32
of Official Records pages 111-112. [Illegible] John
Squellati Recorder By.....Deputy

Fee \$1.50.

U. S. District Court. No. 44274 Y. Trustee's Exhibit
No. 1. Filed Apr. 8/46. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [62]

[TRUSTEE'S EXHIBIT NO. 2]

San Francisco Office
1162 Bryant Street
Telephone UNDERhill 2977

Los Angeles Office
707 E. 61st Street
Telephone ADams 11787

Telephone Main 1015

U. S. MACHINERY COMPANY

Mining Machinery – Contractors Equipment – Shop Tools
1800 Twentieth Street
Sacramento, California

Date November 10, 1944

The U. S. Machinery Company, hereinafter referred to as the Lessor, leases to Quartz Crystal Products Co., P. O. Box 4, San Andreas, California, hereinafter referred to as the Lessee, the following machinery and equipment, for use in Calaveras County, State of California, to-wit:

- 1 – Trommel, complete as inspected, including trunnions, chain, sprocket and thrust roller
- 1 – 100 ft. conveyor, 24", complete with belt
- 1 – Byron Jackson Pump and motor
- 1 – 3-tooth Rooter

— —
— —
— —

plus 91.12 sales tax
for the term of Ten months at a total rental of \$3,645.00 /,
of which amount \$1,245.32, is payable at once, and receipt
whereof is hereby acknowledge by the Lessor; and the
balance \$2,490.80, payable in ten monthly installments of

\$249.08 each, plus interest, as evidenced by notes of even date herewith.

The intent of this lease agreement is that the Lessor leases certain machinery, as herein specified, to the Lessee; and that this lease shall not be construed as a sale.

It is understood and agreed that the machinery shall at all times, be and remain personal property, notwithstanding the manner of its annexation to realty; and that title to said property shall remain in said Lessor until all of the payments herein provided for are made and all of the conditions and terms hereof fully complied with by said Lessee, whereupon should said Lessee so elect, the said Lessor shall make, execute and deliver to said Lessee a bill-of-sale of said property, and sell to said Lessee the said property for the sum of One Dollar (\$1.00).

The time of delivery named herein is the approximate date, and the Lessor shall not be responsible for delays for non-performance occasioned by strikes, fire or other causes beyond its reasonable control.

The acceptance of the machinery when delivered shall constitute a waiver of all objections to same and also waiver of all claims for damages caused by any delay or any injury in transit. The Lessor shall not be liable under this lease, for any special, indirect or consequential damages. The Lessee agrees to keep the above machinery in good repair.

Rental installments due under this lease are evidenced by promissory notes of even date herewith, but said notes are not received by the Lessor, and shall not be deemed to be, payments under this lease until they have been paid.

Risks of fire or other casualty shall be in the Lessee. He shall at his own cost keep said machinery insured

against fire to the extent of \$3,645.00 with the policy, payable to the Lessor. The partial or total destruction of said property by fire or otherwise shall not release the Lessee from obligation to pay balance of rental, but any amount received by Lessor from an insurance company for fire loss shall be credited on unpaid notes.

In the event of default by Lessee in the performance of this lease, or the failure to pay any of said payments when due, or in the event of bankruptcy of Lessee or the taking of said machinery or any part thereof by any persons other than Lessor, by attachment or other process of law, the Lessor may at its option, enter the property in which the machinery is located and without hindrance, directly or indirectly, on the part of the Lessee, take possession of said machinery or any part thereof, and thereupon the Lessee shall have no further interest in or to said property or any portion thereof, and the amount paid prior to the date of said re-possession shall be retained by the Lessor as rental for the use of said machinery during the time that it has been in the custody of the Lessee. The Lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be incurred by the Lessor to enforce this lease or the payment of said rentals, or to re-possess said property as aforesaid.

All previous communications between the parties hereto, either oral or written, with reference to said machinery or this lease, are hereby superseded and no modification hereof shall be binding upon the parties or either of them unless such modification shall be in writing duly accepted and approved by both parties. There are no representations, understandings or agreements outside of this lease.

Full agreement between the parties hereto is contained herein, and time is of the essence of this lease.

Yours very truly,

U. S. MACHINERY COMPANY

By Clyde Henry

Pres.

Accepted: QUARTZ CRYSTAL PRODUCTS CO.

By Raymond I. Biggy

James F. Collins

John W. Buol

Date November 10/44 [63]

State of California,

County of Sacramento—ss.

On this 12th day of December in the year one thousand nine hundred and forty-four, before me, N. W. Hicks, a Notary Public in and for the..... County of Sacramento, State of California, residing therein, duly commissioned and sworn, personally appeared Clyde Henry, known to me [or proved to me on the oath of.....] to be the President of the corporation that executed the within instrument, and also known to me [or proved to me on the oath of] to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, in the.....County of

Sacramento, the day and year in this certificate first
above written.

(Seal)

N. W. Hicks

Notary Public in and for the.....County
of Sacramento, State of California.

State of California,
County of Los Angeles—ss.

On this 14th day of November, A. D., 1944, before me, Burke Mathes, a Notary Public in and for said County and State, personally appeared Raymond I. Biggy, James F. Collins and John W. Buol, known to me, (or proved to me on the oath of.....),

the general

limited

to be one of the partners of the partnership that executed the within instrument, and acknowledged to me
 general

that such a partnership executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal)

Burke Mathes

Notary Public in and for said County and State. [64]

Recorded at the Request of U. S. Machinery Co. Dec.
18, 1944, at 50 minutes past 4 o'clock P. M. in Book 32
of Official Records pages 109-110. [Illegible] John
Squellati Recorder By.....Deputy
Fee \$1.50.

U. S. District Court. No. 44274 Y. Trustee's Exhibit
No. 2. Filed April 8, 1946. Hubert F. Laugharn,
Referee.

[Endorsed]: Filed Feb. 28, 1947. [65]

[TRUSTEE'S EXHIBIT NO. 4]

San Francisco Office
1162 Bryant Street
Telephone Underhill 2977
Los Angeles Office
552 So. Figueroa Street
Telephone Mutual 5405

U. S. MACHINERY COMPANY

Mining—Industrial—Contractors' Equipment

Main Office: 1800 Twentieth Street

Sacramento, California

Telephone 6-6411

Sold To

Our Invoice No. 4774
Quartz Crystal Products Company Date October 4, 1944
P. O. Box 4 Your Order No. Biggy
San Andreas, California Shipped to
Shipped via
Date shipped

Terms: Lease Contract F.O.B.

1 - 60 Caterpillar tractor #PA3361 with 10
ft. dozer blade

| | |
|--------------|------------|
| | \$2,500.00 |
| Sales Tax | 62.50 |
| | <hr/> |
| | \$2,562.50 |
| Down Payment | 818.75 |
| | <hr/> |
| | \$1,743.75 |

Balance payable in 9 monthly payments of \$193.75

[Written]: Dec. 9/44—check #260

U. S. District Court. No. 44274 Y. Trustee's Exhibit
No. 4. Filed April 8/46. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [66]

[TRUSTEE'S EXHIBIT NO. 5]

San Francisco Office
 1162 Bryant Street
 Telephone Underhill 2977
 Los Angeles Office
 552 So. Figueroa Street
 Telephone Mutual 5405

U. S. MACHINERY COMPANY
 Mining—Industrial—Contractors' Equipment

Main Office: 1800 Twentieth Street
 Sacramento, California Telephone 6-6411

Sold To

| | |
|---------------------------------|----------------------|
| | Our Invoice No. 4773 |
| Quartz Crystal Products Company | Date October 4, 1944 |
| P. O. Box 4 | Your Order No. Biggy |
| San Andreas, California | Shipped to |
| | Shipped via |
| | Date shipped |

Terms: Lease Contract F.O.B.

| | |
|--|------------|
| 1 - Trommel, complete as inspected, including trunions, chain, sprocket and thrust roller | \$1,200.00 |
| 1 - 100 ft. conveyor 24" complete with belt | 1,700.00 |
| 1 - Byron Jackson Pump and Motor | 650.00 |
| 1 - 3 tooth rooter | 95.00 |
| | <hr/> |
| | \$3,645.00 |
| Sales Tax | 91.12 |
| | <hr/> |
| | \$3,736.12 |

1/3 Down Payment 1,245.32

Balance \$2,490.80

Balance payable 10 payments of \$249.08—monthly

U. S. District Court. No. 44274 Y. Trustee's Exhibit
No. 5. Filed April 8/46. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [67]

[TRUSTEE'S EXHIBIT NO. 6]

Friendly Acres Water Co. West Sacramento Water Co.
Brisbane Water Co. Gold Beach Cooperative Utilities
Klamath Water, Light & Power Co.
Point Arena Electric Light & Power Co.

CLYDE HENRY ENTERPRISES

1568 Russ Building
DOuglas 7327

San Francisco, 4, California
December 11, 1945

Mr. Raymond I. Biggy
903 Alta Street
Monrovia, California

Dear Mr. Biggy:

As I have not heard from you regarding the payments
on the equipment I presume your negotiations were not
successful.

As you know, our circumstances make it impossible to hold out any longer so it will be necessary to repossess the equipment.

Sincerely yours,

Clyde Henry

Clyde Henry

CH:MH[68]

December 13, 1945

Mr. Clyde Henry,
1568 Russ Building,
San Francisco, California

Dear Mr. Henry:

Reference is made to your letter of December 11, 1945. Our negotiations for the loan which I wrote you about have been delayed, awaiting an engineer's report, which I am advised, was received yesterday.

As a personal consideration to me, I would appreciate it if you would with-hold any action in the matter of repossessing the equipment for another week, as I am quite confident we will have this matter cleaned up by December 20th.

Thanking you for your indulgence in this matter, I am

Sincerely yours,

RIB:a

U. S. District Court. No. 44274 Y. Trustee's Exhibit No. 6. Filed April 8/46. Hubert F. Laugharn, Referee.
[Endorsed]: Filed Feb. 28, 1947. [69]

[TRUSTEE'S EXHIBIT NO. 7]

In the Superior Court of the State of California in and for the County of Calaveras.

U. S. Machinery Company, a corporation, Plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, Defendants. No. 3171.

AFFIDAVIT FOR CLAIM AND DELIVERY

State of California

City and County of San Francisco—ss.

Clyde W. Henry, being first duly sworn, deposes and says:

1. That he is the president of the U. S. Machinery Company, a corporation, the plaintiff above-named.

2. That plaintiff is lawfully entitled to the possession of the property claimed in this action, which is described as follows; to-wit:

1 – Trommel, including trunnions, chain, sprocket, and thrust roller

1 – 100 ft. conveyor, 24", complete with belt

1 – Byron Jackson pump and motor

1 – 3-tooth Rooter [written]: can't locate

3. That said property is wrongfully detained by the [70] defendant herein;

4. That, according to the best knowledge, information and belief of this affiant, the alleged cause of such detention of said property is as follows, to-wit: an invalid claim of right under lease contract now in default.

5. That neither said property nor any part thereof has been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or an attachment against the property of the plaintiff;

6. That the actual value of said property is \$3,645.00.

Clyde W. Henry

Subscribed and sworn to before me this 21st day of February, 1946.

(Seal)

LAURA E. HUGHES

Notary Public in and for the City and County of
San Francisco, State of California. [71]

No. 107345

GENERAL CASUALTY COMPANY OF AMERICA
Seattle, Washington

Premium Charged for This Bond
Is \$72.90 Per Annum.

In the Superior Court of the.....
County of Calaveras, State of California.

U. S. Machinery Company, a corporation, Plaintiff, vs.
Raymond I. Biggy, James F. Collins, and John W. Buol,
individually, and doing business as the Quartz Crystal
Products Company, First Doe and Second Doe, De-
fendants.

UNDERTAKING ON CLAIM AND DELIVERY OF
PERSONAL PROPERTY
C. C. P., Secs. 512-513-870

Whereas, it is alleged by plaintiff herein, that defend-
ants have in their possession and unjustly detain certain

personal property, belonging to the plaintiff to the possession of which plaintiff is entitled, of the value of Three Thousand Six Hundred Forty-Five and No/100 ----- (\$3,645.00) ----- Dollars

And Whereas, the plaintiff wants the said property delivered to it and by endorsement in writing upon an affidavit filed herein, has ordered the Sheriff of the..... County of Calaveras, to take the said property from defendants

Now, Therefore, the undersigned General Casualty Company of America, a corporation duly organized and existing under the laws of the State of Washington, and duly authorized to transact a general surety business in the State of California, in consideration of the delivery of said property to the said plaintiff hereby acknowledges itself bound in the sum of Seven Thousand Two Hundred Ninety and No/100 ----- (\$7,290.00) ----- Dollars (being double the value of said property as stated in the affidavit), for the prosecution of the said action,for the return of said property to the defendants if return thereof be adjudged, and for the payment to the defendants of such sum as may, from any cause, be recovered against plaintiff.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 21st day of February, A. D., 1946.

GENERAL CASUALTY COMPANY OF AMERICA

By Edith O'Rourke

Edith O'Rourke, Attorney-in-Fact.

Executed in Duplicate.

State of California

City and County of San Francisco—ss.

On this 21st day of February, 1946, personally appeared before me Edith O'Rourke, the Attorney-in-fact of the General Casualty Company of America, with whom I am personally acquainted, who being by me duly sworn,

and county

stated, that *he* resides in the city / of San Francisco, in the State of California; that *he* is attorney-in-fact of the General Casualty Company of America, the corporation described in and which executed the foregoing instrument; that *he* knows the corporate seal of the said Company; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by the order of the Board of Directors of said Company; that *he* signed *his* name thereto as Attorney-in-fact under like authority, and that said authority has not been revoked or rescinded.

Notary Affidavit

Marie H. Stanley

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 20, 1947.

The within undertaking and the sureties thereof are hereby approved.

Dated Feb. 21-46.

Joe W. Zwinge

Sheriff of Calaveras County, Calif. [73]

Louis J. Glicksberg
Albert H. Gommo
One Montgomery Street
San Francisco, California
Attorneys for Plaintiff

In the Superior Court of the State of California in
and for the County of Calaveras

U. S. Machinery Company, a corporation, Plaintiff, vs.
Raymond I. Biggy, James F. Collins, and John W. Buol,
individually, and doing business as the Quartz Crystal
Products Company, First Doe and Second Doe, Defendants. No. 3171

COMPLAINT IN CLAIM AND DELIVERY

Plaintiff complains of the defendants and for cause of
action alleges:

I.

That plaintiff is not aware of the true names or capacities, whether individual, corporate, associate or otherwise, of Defendants Doe I and Doe II, and, therefore, sues said defendants by such fictitious names, and leave of Court will be asked to amend this complaint to show their true names and capacities when same have been ascertained.

II.

That at all times in this complaint mentioned, the plaintiff, U. S. Machinery Company, was, and *no* is, a corporation legally organized and doing business under the laws of the State [74] of California.

III.

That plaintiff is informed and believes, and upon such information and belief alleges: That the defendants, Raymond I. Biggy, James F. Collins, and John W. Buol, are co-partners to do business under the firm name and style of Quartz Crystal Products Company, whose main office is in the City of San Andreas, County of Calaveras, State of California.

IV.

That on or about the 10th day of November, 1944, the plaintiff was the legal owner and in possession of that certain equipment consisting of the following:

- 1 – Trommel, including trunnions, chain, sprocket and thrust roller;
- 1 – 100 ft. conveyor, 24", complete with belt;
- 1 – Byron Jackson pump and motor;
- 1 – 3-tooth Rooter;

and that on or about said date, the said plaintiff, by a lease contract in writing, a copy of which is attached hereto and marked "Exhibit 'A'," and made a part hereof as though set out in full, delivered the said equipment to the said defendants; that said contract provides for monthly payments.

V.

The said contract provides, in part, that in the event of default by lessee (being the defendants herein) in the performance of this lease, or the failure to pay any of said payments when due, the said lessor (being the plaintiff herein) may at its option enter the property in which the machinery is located and without hindrance, directly

or indirectly, on the part of the lessee, take possession of said machinery or any part thereof, and thereupon the lessee shall have no further interest in or to said property or any portion thereof, and the amount paid prior to the date of said re-possession shall be retained by the lessor as rental for the use of said machinery [75] during the time that it has been in the custody of the lessee. The lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be incurred by the lessor to enforce this lease or the payment of said rentals, or to repossess said property as aforesaid.

VI.

That there is *no* due and unpaid the sum of One Thousand, Six Hundred and Twenty-two and 48/100 (\$1,622.48) Dollars on the payments provided by said contract, there having been no installments paid subsequent to April 25, 1945, and that there remains a total unpaid balance due to the plaintiff under the terms of the said contract, including interest, the sum of One Thousand, Six Hundred and Twenty-two and 48/100 (\$1,622.48) Dollars no part of which has been paid.

VII.

That the plaintiff does hereby elect to take immediate possession of the said personal property, and elects that all payments previously made by the purchaser shall be applied as compensation for the depreciation in value and for the use of the said property.

VIII.

That prior to the commencement of this action, oral demand was made upon the defendants for the delivery of the possession of the said equipment to this plaintiff, but

that the defendants have failed, refused and neglected and still fail, refuse and neglect to deliver possession of the said equipment to this plaintiff, or cause the same to be done, and the defendants, without plaintiff's consent, detain the said equipment from the possession of the plaintiff, to plaintiff's damage.

IX.

That neither the said property, nor any part thereof, has been taken for a tax, assessment or a fine, pursuant to [76] statute or seized under an execution or an attachment against the property of the plaintiff, and that the plaintiff is entitled to the immediate possession of the said equipment. That the actual cash value of the said equipment is the sum of Three Thousand, Six Hundred and Forty-five and no/100 (\$3,645.00) Dollars.

X.

That plaintiff has employed an attorney for the prosecution of this action, and the recovery of the possession of the said equipment, and that his reasonable compensation for said services is, and at all times in this complaint mentioned was, the sum of Five Hundred and no/100 (\$500.00) Dollars, which attorneys' fees are provided for in said contract.

XI.

That all of the defendants claim to have some claim, right, or interest in and to the said equipment or in the said contract, but plaintiff avers that such right or claim, if any, is invalid and subordinate to that of plaintiff.

Wherefore, plaintiff prays judgment against the defendants:

1. For the recovery of the possession of said equipment, or for the sum of Three Thousand, Six Hundred and Forty-five and no/100 (\$3,645.00) Dollars, the market value thereof in case recovery cannot be had.

2. For the sum of Five Hundred and no/100 (\$500.00) Dollars as and for attorneys' fees.

3. For costs of suit herein.

4. For such other and further relief as the Court may deem meet and proper.

LOUIS J. GLICKSBERG

ALBERT H. GOMMO, JR.

Per.....

Attorneys for Plaintiff. [77]

State of California

City and County of San Francisco—ss.

Clyde W. Henry, being duly sworn on behalf of the plaintiff corporation in the above-entitled action, says:

That he is the president of said corporation; that he has read the foregoing complaint, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

Clyde W. Henry

Subscribed and sworn to before me this 21 day of February, 1946.

(Seal)

LAURA E. HUGHES

Notary Public in and for the City and County of San Francisco, State of California. [78]

EXHIBIT "A"

U. S. MACHINERY COMPANY

Sacramento, California

November 10, 1944

The U. S. Machinery Company, hereinafter referred to as the Lessor, leases to Quartz Crystal Products Co., P. O. Box 4, San Andreas, California, hereinafter referred to as the Lessee, the following machinery and equipment, for use in Calaveras County, State of California, to-wit:

- 1 – Trommel, complete as inspected, including trunnions, chain, sprocket and thrust roller
- 1 – 100 ft. conveyor, 24", complete with belt
- 1 – Byron Jackson pump and motor
- 1 – 3-tooth Rooter

for the term of Ten months at a total rental of \$3,645.00 plus 91.12 sales tax, of which amount \$1,245.32 is payable at once, and receipt whereof is hereby acknowledged by the Lessor; and the balance \$2,490.80, payable in ten monthly installments of \$249.08 each, plus interest, as evidenced by notes of even date herewith.

The intent of this lease agreement is that the Lessor leases certain machinery, as herein specified, to the Lessee; and that this lease shall not be construed as a sale.

It is understood and agreed that the machinery shall at all times, be and remain personal property, notwithstanding the manner of its annexation to realty; and that title to said property shall remain in said Lessor until all of the payments herein provided for are made and all of the conditions and terms hereof fully complied with by said Lessee, whereupon should said Lessee so elect,

the said Lessor shall make, execute and deliver to said Lessee a bill-of-sale of said property and sell to said Lessee the said property for the sum of One Dollar (\$1.00).

The time of delivery named herein is the approximate date, and the Lessor shall not be responsible for delays for non-performance occasioned by strikes, fire or other causes beyond its reasonable control.

The acceptance of the machinery when delivered shall constitute a waiver of all objections to same and also waiver of all claims for damages caused by any delay or any injury in transit. The Lessor shall not be liable under this lease, for any special, indirect or consequential damages. The Lessee agrees to keep the above machinery in good repair.

Rental installments due under this lease are evidenced by promissory notes of even date herewith, but said notes are not received by the Lessor, and shall not be deemed to be, payments under this lease until they have been paid.

Risks of fire or other casualty shall be in the Lessee. He shall at his own cost keep said machinery insured against fire to the extent of \$3,645.00 with the policy, payable to the Lessor. The partial or total destruction of said property by fire or otherwise shall not release the Lessee from obligation to pay balance [79] of rental, but any amount received by Lessor from an insurance company for fire loss shall be credited on unpaid notes.

In the event of default by Lessee in the performance of this lease, or the failure to pay any of said payments when due, or in the event of bankruptcy of Lessee or the taking of said machinery or any part thereof by any persons other than Lessor, by attachment or other process

of law, the Lessor may at its own option enter the property in which the machinery is located and without hindrance, directly or indirectly, on the part of the Lessee, take possession of said machinery or any part thereof, and thereupon the Lessee shall have no further interest in or to said property or any portion thereof, and the amount paid prior to the date of said re-possession shall be retained by the Lessor as rental for the use of said machinery during the time that it has been in the custody of the Lessee. The Lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be incurred by the Lessor to enforce this lease or the payment of said rentals, or to re-possess said property as aforesaid.

All previous communications between the parties hereto, either oral or written, with reference to said machinery or this lease, are hereby superseded and no modification hereof shall be binding upon the parties or either of them unless such modification shall be in writing duly accepted and approved by both parties. There are no representations, understandings or agreements outside of this lease.

Full agreement between the parties hereto is contained herein, and time is of the essence of this lease.

Yours very truly,

U. S. MACHINERY COMPANY

By CLYDE HENRY, President.

Accepted:

QUARTZ CRYSTAL PRODUCTS CO.

RAYMOND I. BIGGY

JAMES F. COLLINS

JOHN W. BUOL

Date: November 10/44. [80]

In the Superior Court of the State of California in and for the County of Calaveras

U. S. Machinery Company, a corporation, Plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, Defendants. No. 3171.

Action brought in the Superior Court of the State of California in and for the County of Calaveras and the complaint filed in the office of the County Clerk of said Calaveras County.

Louis J. Glicksberg

Albert H. Gommo

Attorneys for Plaintiff

The People of the State of California send Greeting to: Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, defendants.

You Are Hereby Directed to Appear and answer the complaint in an action entitled as above, brought against you in the Superior Court of the State of California in and for the County of Calaveras, within ten days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or plaintiff will apply to the court for any other relief demanded in the complaint.

Given under my hand and the seal of the Superior Court of the State of California in and for the County of Calaveras this 21st day of February, 1946.

(Seal) JOHN SQUELLATI, Clerk.

By....., Deputy Clerk. [81]

* * * * *

U. S. District Court. No. 44274 Y. Trustee's Exhibit No. 7. Filed April 8, 1946. Hubert F. Laugharn, Deputy.

[Endorsed]: Filed Feb. 28, 1947. [82]

[TRUSTEE'S EXHIBIT NO. 8]

LOUIS J. GLICKSBERG

ALBERT H. GOMMO

One Montgomery Street
San Francisco, California

In the Superior Court of the State of California in and for the County of Calaveras

U. S. Machinery Company, a corporation, Plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, Defendants. No. 3172.

AFFIDAVIT FOR CLAIM AND DELIVERY

State of California

City and County of San Francisco—ss.

Clyde W. Henry, being first duly sworn, deposes and says:

1. That he is the President of the U. S. Machinery Company, a corporation, the plaintiff above-named.

2. That plaintiff is lawfully entitled to the possession of the property claimed in this action and is described as follows, to-wit:

1 - 60 Caterpillar Tractor No. PA3361, with 10 ft. dozer blade.

3. That said property is wrongfully detained by the defendant herein;

4. That, according to the best knowledge, information, and [83] belief of this affiant, the alleged cause of such detention of said property is as follows, to-wit: an invalid claim of right under lease contract now in default.

5. That neither said property nor any part thereof has been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or an attachment against the property of the plaintiff;

6. That the actual value of said property is \$2,500.00.

CLYDE W. HENRY

Subscribed and sworn to before me this 21st day of February, 1945.

Notary Public in and for the City and County of
San Francisco, State of California. [84]

No. 107344

GENERAL CASUALTY COMPANY OF AMERICA
Seattle, WashingtonPremium Charged for This Bond
Is \$50.00 Per Annum.In the Superior Court of the.....County of
Calaveras, State of California.U. S. Machinery Company, a corporation, Plaintiff, vs.
Raymond I. Biggy, James F. Collins and John W. Buol,
individually, and doing business as the Quartz Crystal
Products Company, First Doe and Second Doe, De-
fendantsUNDERTAKING ON CLAIM AND DELIVERY OF
PERSONAL PROPERTY

C. C. P., Secs. 512-513-870

Whereas, it is alleged by plaintiff herein, that defend-
ants have in their possession and unjustly detain certain
personal property, belonging to the plaintiff to the pos-
session of which plaintiff is entitled, of the value of
Twenty-Five Hundred Dollars - - - - - (\$2500.00) - - - - -
DollarsAnd Whereas, the plaintiff wants the said property de-
livered to it and by endorsement in writing upon an af-
fidavit filed herein, has ordered the Sheriff of the.....
County of Calaveras, to take the said property from de-
fendants.

Now, Therefore, the undersigned General Casualty Company of America, a corporation duly organized and existing under the laws of the State of Washington, and duly authorized to transact a general surety business in the State of California, in consideration of the delivery of said property to the said plaintiff hereby acknowledges itself bound in the sum of Five Thousand and No/100 ----- (\$5,000.00) ----- Dollars (being double the value of said property as stated in the affidavit), for the prosecution of the said action, for the return of said property to the defendants if return thereof be adjudged, and for the payment to the defendants of such sum as may, from any cause, be recovered against plaintiff.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 21st day of February, A. D., 1946.

GENERAL CASUALTY COMPANY OF AMERICA

By Edith O'Rourke

Edith O'Rourke, Attorney-in-Fact.

Executed in Duplicate.

State of California

City and County of San Francisco—ss.

On this 21st day of February, 1946, personally appeared before me Edith O'Rourke, the Attorney-in-fact of the General Casualty Company of America, with whom I am personally acquainted, who being by me duly sworn,

and county

stated, that *he* resides in the city / of San Francisco, in the State of California; that *he* is attorney-in-fact of the General Casualty Company of America, the corporation described in and which executed the foregoing instrument; that *he* knows the corporate seal of the said Company; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by the order of the Board of Directors of said Company; that *he* signed *his* name thereto as Attorney-in-fact under like authority, and that said authority has not been revoked or rescinded.

Notary Affidavit.

Marie H. Stanley

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 20, 1947.

The within undertaking and the sureties thereof are hereby approved.

Dated Feb. 21-46.

Joe W. Zwinge

Sheriff of Calaveras County, Calif. [85]

LOUIS J. GLICKSBERG

ALBERT H. GOMMO

One Montgomery Street

San Francisco, California

Attorneys for Plaintiff.

In the Superior Court of the State of California in
and for the County of Calaveras

U. S. Machinery Company, a corporation, Plaintiff, vs.
Raymond I. Biggy, James F. Collins, and John W. Buol,
individually, and doing business as the Quartz Crystal
Products Company, First Doe and Second Doe, Defendants.
No. 3172.

COMPLAINT IN CLAIM AND DELIVERY

Plaintiff complains of the defendants and for cause of
action alleges:

I.

That plaintiff is not aware of the true names or capacities, whether individual, corporate, associate or otherwise, of Defendants Doe I and Doe II, and, therefore, sues said defendants by such fictitious names, and leave of Court will be asked to amend this complaint to show their true names and capacities when same have been ascertained.

II.

That at all times in this complaint mentioned, the plaintiff, U. S. Machinery Company was, and now is, a corporation legally organized and doing business under the laws of the State [86] of California.

III.

That plaintiff is informed and believes, and upon such information and belief alleges: that the defendants, Raymond I. Biggy, James F. Collins, and John W. Buol, are co-partners to do business under the firm name and style of Quartz Crystal Products Company whose main office is in the City of San Angreas, County of Calaveras, State of California.

IV.

That on or about the 10th day of November, 1944, the plaintiff was the legal owner and in possession of that certain equipment consisting of the following:

- 1 – 60 Caterpillar Tractor No. PA3361, with 10 ft. dozer blade.

And that on or about said date, the said plaintiff, by a lease contract in writing, a copy of which is attached hereto and marked "Exhibit A", and made a part hereof as though set out in full, delivered the said equipment to the said defendants; that said contract provides for monthly payments.

V.

The said contract provides, in part, that in the event of default by lessee (being the defendants herein) in the performance of this lease, or the failure to pay any of said payments when due the said lessor (being the plaintiff herein) may at its option enter the property in which the machinery is located and without hindrance, directly or indirectly, on the part of the lessee, take possession of said machinery or any part thereof, and thereupon the lessee shall have no further interest in or to said property or any portion thereof, and the amount paid

prior to the date of said re-possession shall be retained by the lessor as rental for the use of said machinery during the time that it has been in the custody of the lessee. The lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be [87] incurred by the lessor to enforce this lease or the payment of said rentals, or to re-possess said property as aforesaid.

VI.

That there is now due and unpaid the sum of Eight Hundred Forty-nine and 67/100 Dollars (\$849.67) on the payments provided by said contract, there having been no installments paid subsequent to April 25, 1945, and that there remains a total unpaid balance due to the plaintiff under the terms of the said contract, including interest, the sum of Eight Hundred Forty-nine and 67/100 Dollars (\$849.67), no part of which has been paid.

VII.

That the plaintiff does hereby elect to take immediate possession of the said personal property, and elects that all payments previously made by the purchaser shall be applied as compensation for the depreciation in value and for the use of the said property.

VIII.

That prior to the commencement of this action, oral demand was made upon the defendants for the delivery of the possession of the said equipment to this plaintiff, but the defendants have failed, refused and neglected and still fail, refuse and neglect to deliver possession of the said equipment to this plaintiff, or cause the same to be

done, and the defendants, without plaintiff's consent, detain the said equipment from the possession of the plaintiff, to plaintiff's damage.

IX.

That neither the said property, nor any part thereof, has been taken for a tax, assessment or a fine, pursuant to statute or seized under an execution or an attachment against the property of the plaintiff, and that the plaintiff is entitled to the immediate possession of the said equipment. That the actual cash value of the said equipment is the sum of Two Thousand, Five Hundred [88] and no/100 Dollars (\$2,500.00).

X.

That plaintiff has employed an attorney for the prosecution of this action, and the recovery of the possession of said equipment, and that his reasonable compensation for said services is, and at all times in this complaint mentioned was, the sum of Five Hundred and no/100 Dollars (\$500.00), which attorneys' fees are provided for in said contract.

XI.

That all of the defendants, claim to have some claim, right, or interest in and to the said equipment or in the said contract, but plaintiff avers that such right or claim, if any, is invalid and subordinate to that of plaintiff.

Wherefore, prays judgment against the defendants:

1. For the recovery of the possession of said equipment, or for the sum of Two Thousand Five Hundred and no/100 Dollars (\$2,500.00), the market value thereof in case recovery cannot be made.

2. For the sum of Five Hundred and no/100 Dollars (\$500.00) as and for attorneys' fees.

3. For cost of suit herein.

4. For such other and further relief as the Court may deem, meet and proper.

LOUIS J. GLICKSBERG

ALBERT H. GOMMO, JR.

Per.....

Attorneys for Plaintiff [89]

State of California

City and County of San Francisco—ss.

Clyde W. Henry, being duly sworn on behalf of the plaintiff corporation in the above-entitled action, says:

That he is the president of said corporation; that he has read the foregoing complaint, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

Clyde W. Henry

Subscribed and sworn to before me this 21 day of February, 1946.

(Seal)

LAURA E. HUGHES

Notary Public in and for the City and County of San Francisco, State of California. [90]

EXHIBIT "A"

U. S. MACHINERY COMPANY

Sacramento, California.

November 10, 1944

The U. S. Machinery Company, hereinafter referred to as the Lessor, leases to Quartz Crystal Products Co., P. O. Box 4, San Andreas California, hereinafter referred to as the Lessee, the following machinery and equipment, for use in Calaveras County, State of California, to-wit:

1 - 60 Caterpillar Tractor No. PA3361, with 10 ft. dozer blade.

for the term of nine months at a total rental of \$2500.00 plus \$62.50 sales-tax, of which amount \$818.75 is payable at once, and receipt whereof is hereby acknowledged by the Lessor; and the balance \$1,743.75, payable in nine monthly installments of \$193.75 each, plus interest, as evidenced by notes of even date herewith.

The intent of this lease agreement is that the Lessor leases certain machinery, as herein specified, to the Lessee; and that this lease shall not be construed as a sale.

It is understood and agreed that the machinery shall at all times, be and remain personal property, notwithstanding the manner of its annexation to realty; and that title to said property shall remain in said Lessor until all of the payments herein provided for are made and all of the conditions and terms hereof fully complied with by said Lessee, whereupon should said Lessee so elect, the said Lessor shall make, execute and deliver to said Lessee a bill-of-sale of said property, and sell to said Lessee the said property for the sum of One Dollar (\$1.00).

The time of delivery named herein is the approximate date, and the Lessor shall not be responsible for delays for non-performance occasioned by strikes, fire or other causes beyond its reasonable control.

The acceptance of the machinery when delivered shall constitute a waiver of all objections to same and also waiver of all claims for damages caused by any delay or injury in transit. The Lessor shall not be liable under this lease, for any special, indirect or consequential damages. The Lessee agrees to keep the above machinery in good repair.

Rental installments due under this lease are evidenced by promissory notes of even date herewith, but said notes are not received by the Lessor; and shall not be deemed to be payments under this lease until they have been paid.

Risks of fire or other casualty shall be in the Lessee. He shall at his own cost keep said machinery insured against fire to the extent of \$2,500.00 with the policy, payable to the Lessor. The partial or total destruction of said property by fire or otherwise shall not release the Lessee from obligation to pay [91] balance of rental, but any amount received by Lessor from an insurance company for fire loss shall be credited on unpaid notes.

In the event of default by Lessee in the performance of this lease, or the failure to pay any of said payments when due, or in the event of bankruptcy of Lessee or the taking of said machinery or any part thereof by any persons other than Lessor, by attachment or other process of law, the Lessor may at its own option enter the property in which the machinery is located and without hindrance, directly or indirectly, on the part of the Lessee,

take possession of said machinery or any part thereof, and thereupon the Lessee shall have not further interest in or to said property or any portion thereof, and the amount paid prior to the date of said re-possession shall be retained by the Lessor as rental for the use of said machinery during the time that it has been in the custody of the Lessee. The Lessee agrees to pay upon demand all expenses, including attorneys' fees, that may be incurred by the Lessor to enforce this lease or the payment of said rentals, or to re-possess said property as aforesaid.

All previous communications between the parties hereto, either oral or written, with reference to said machinery or this lease, are hereby superseded and no modification hereof shall be binding upon the parties or either of them unless such modification shall be in writing duly accepted and approved by both parties. There are no representations, understandings or agreements outside of this lease.

Full agreement between the parties hereto is contained herein, and time is of the essence of this lease.

Yours very truly,

U. S. MACHINERY COMPANY
By CLYDE HENRY, President

Accepted:

QUARTZ CRYSTAL PRODUCTS CO.
RAYMOND I. BIGGY
JAMES F. COLLINS
JOHN W. BUOL

Date: November 10/44 [92]

In the Superior Court of the State of California in and for the County of Calaveras

U. S. Machinery Company, a corporation, Plaintiff, vs. Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, Defendants. No. 3171.

Action brought in the Superior Court of the State of California in and for the County of Calaveras and the complaint filed in the office of the County Clerk of said Calaveras County.

Louis J. Glicksberg

Albert H. Gommo

Attorneys for Plaintiff

The People of the State of California send Greeting to: Raymond I. Biggy, James F. Collins, and John W. Buol, individually, and doing business as the Quartz Crystal Products Company, First Doe and Second Doe, defendants.

You are Hereby Directed to Appear and answer the complaint in an action entitled as above, brought against you in the Superior Court of the State of California in and for the County of Calaveras, within ten days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or plaintiff will apply

to the court for any other relief demanded in the complaint.

Given under my hand and the seal of the Superior Court of the State of California in and for the County of Calaveras this 21st day of February, 1946.

(Seal) JOHN SQUELLATI, Clerk.

By....., Deputy Clerk.

U. S. District Court. No. 44274 Y. Trustee's Exhibit No. 8. Filed April 8, 1946. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [93]

[TRUSTEE'S EXHIBIT NO. 9]

WESTERN UNION

* * * * *

FAB35 NL PD VIA AB=FALLON NEV DEC 31

CLYDE HENRY

1946 JAN 2 AM 9 14

285 7THST MK=

DELAYED HERE UNTIL FRIDAY. WILL BE IN
TO TAKE UP QUARTZ CRYSTAL PRODUCTS
OBLIGATION SATURDAY=

R I BIGGY

BIGGY

U. S. District Court. No. 44274 Y. Trustee's Exhibit No. 9. Filed April 8/46. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [94]

[TRUSTEE'S EXHIBIT NO. 16]

November 1, 1945.

Mr. Harry Gottesfeld,
De Young Bldg.,
San Francisco, California.

Dear Sir:—

At the request of Mr. Raymond Biggy we are pleased to submit our personal opinion of the value of the Quartz Crystal Mines equipment, located near San Andreas, California.

My estimate of the value of the plant would be \$35,000.00, and I would state further that the equipment should bring not less than eighteen or nineteen thousand dollars at a forced sale.

Sincerely yours,

Clyde Henry
Clyde Henry.

CH/s

CC: to Raymond Biggy,
903 Alta St.
Monrovia, Calif.

U. S. District Court. No. 44274 Y. Trustee's Exhibit No. 16. Filed April 19, 1946. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Feb. 28, 1947. [95]

[Title of District Court and Cause]

SUPPLEMENT TO REFEREE'S CERTIFICATE
ON REVIEW

To the Honorable Leon R. Yankwich, Judge of the United
States District Court for the Southern District of
California, Central Division:

I, Hubert F. Laugharn, Referee in *Bankrupt* to whom
the above entitled matter has been referred, do hereby
certify as follows:

On February 28, 1947, I made and filed herein my Cer-
tificate on Review.

A request has been made by Charles A. Thomasset
that there be added to the record herein and forwarded to
the Clerk the following, to-wit: Respondent's Exhibit No.
1, filed April 19, 1946, in within proceedings, the same
being a Certificate of Business Fictitious Firm Name for
Quartz Crystal Products Co. and the same is therefore
respectfully submitted.

Dated: August 11, 1947.

HUBERT F. LAUGHARN
Referee in Bankruptcy [96]

[RESPONDENT'S EXHIBIT NO. 1]

CERTIFICATE OF BUSINESS
FICTITIOUS FIRM NAME.

The Undersigned do hereby certify that they are conducting a mining business at near the city of San Andreas, in the county of Calaveras, in the State of California, under the fictitious firm name of Quartz Crystal Products Co. and that said firm is composed of the following persons, whose names and addresses are as follows, to-wit:

| | | |
|---------------------|-----------------------|--------------------|
| Raymond I. Biggy | 1304 Alameda Street | Monrovia, Calif. |
| John W. Buol | 3625 Falcon Avenue | Long Beach, Calif. |
| James F. Collins | 443 Orange Avenue | Long Beach, Calif. |
| Frank A. Briggs | 918 Freeman Street | Santa Ana, Calif. |
| Leona W. Briggs | 918 Freeman Street | Santa Ana, Calif. |
| Peter Mirich | 531 So. Harbor | San Pedro, Calif. |
| Jack Burns | 1800 East Broadway | Long Beach, Calif. |
| Clyde J. Maylen | 4421 Whitewood St. | Lakewood, Calif. |
| Harold L. Maylen | 1601 Cedar Avenue | Long Beach, Calif. |
| Robert Francis Crow | 333 Obispo Street | Long Beach, Calif. |
| T. I. Lingo | 4140 Country Club Dr. | Long Beach, Calif. |

Witness their hands this 26th day of May, 1944.

| | |
|------------------|---------------------|
| Raymond I. Biggy | Peter Mirich |
| John W. Buol | Jack Burns |
| James F. Collins | Harold L. Maylen |
| Frank A. Briggs | Clyde J. Maylen |
| Leona W. Briggs | Robert Francis Crow |
| | T. I. Lingo. [97] |

State of California,
County of Los Angeles, ss.

On this 26th day of May, A. D. 1944, before me, Lee J. Myers, a Notary Public in and for said County and State, personally appeared Raymond I. Biggy, John W. Buol, James F. Collins, Frank A. Briggs, Leona W. Briggs, Peter Murich, Jack Burns, Clyde J. Maylen, Harold L. Maylen, T. I. Lingo, known to me to be the persons whose names are subscribed to the within *Instrument*, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal)

Lee J. Myers

Notary Public in and for said County and State.

(Endorsed) Filed Jun 22 1944 John Squellati, County Clerk.

The Foregoing Instrument is a Correct Copy of the Original on File in This Office. Attest: Apr. 17, 1946. John Squellati, County Clerk and ex-officio Clerk of the Supreme Court of the State of California, in and for the County of Calaveras. By, Deputy.

U. S. District Court. No. 44274 Y. Respondent's Exhibit No. 1. Filed April 19, 1946. Hubert F. Laugharn, Referee.

[Endorsed]: Filed Aug. 11, 1947. [98]

[Title of District Court and Cause]

POINTS AND AUTHORITIES ON PETITION FOR
REVIEW OF U. S. MACHINERY COMPANY

To the Honorable Leon R. Yankwich, Judge of the United
States District Court for the Southern District of
California, Central Division:

The Referee has held herein that the two agreements of lease, in writing, dated November 10, 1944, wherein this petitioner is the lessor and bankrupt above named is the lessee, are invalid as against the creditors of the lessee.

The Referee has held that the agreements were executed not later than November 14, 1944, and not recorded until December 18, 1944, therefore invalid under Section 2980 of the Civil Code of the State of California, which requires such recordation within 20 days after execution.

Petitioner contends that such holding is erroneous and that [99] both of the agreements were executed December 14, 1944. It is admitted that these agreements were recorded on December 18, 1944. This petitioner contends that there is no evidence, either direct or inferential, of sufficient substance to support the Referee's decision that the agreements were "executed" on November 14, 1944.

I.

THE EVIDENCE:

Clyde Henry, President of petitioner, U. S. Machinery Company, who, on behalf of petitioner, executed said agreements, testified on April 8, 1946, as follows:

Q. Mr. Henry, I will now show you Trustee's Exhibit 1, which is the contract or lease agreement on the Caterpil-

lar tractor and I ask you when that was signed by you on behalf of the U. S. Machinery Company?

A. That was signed on December the 12th, 1944.

Q. And I will now show you Trustee's Exhibit 2, which is the trommel and so forth lease agreement, and ask you when that was signed on the part of the U. S. Machinery Company?

A. On the 12th day of December, 1944, I signed it.

Q. And prior to the 12th day of December, 1944, neither of the instruments or agreements had been executed by the U. S. Machinery Company, had they?

A. That is correct.

Later at the same session, the Referee himself elicited the following testimony:

Q. What was the reason for the delay in the execution of the contracts on your behalf?

A. Which contracts?

Q. Exhibits 1 and 2, the original ones.

A. They were mailed to Mr. Biggy and they got back to our office on or about December the 10th and I signed it on December the 12th and we mailed it to San Andreas to be [100] recorded.

Q. They bear date of November the 10th, 1944, and a notarial acknowledgement on November 14, 1944, and then the notarial acknowledgment of your secretary December 12, 1944. You are of the opinion that the signed contracts by the buyers were not received back in your office until about December the 10th?

A. That is right.

Q. And you thereupon signed them and recorded them on December the 18th, 1944. Did a letter accompany them?

A. That I could not say because they telephone me in San Francisco that the contracts had been received and I went to Sacramento and signed them.

Under cross-examination by the Trustee's counsel the following testimony was adduced from the same witness:

Q. By Mr. Goggin: Now, you say you received contracts back about December 10th?

A. That is correct.

Q. How do you fix that date?

A. Because I had brought pressure on the Sacramento office to have this contract drawn right and have it recorded, because it had come to my attention that this outfit was not too reliable.

Q. Did you contact them from Sacramento?

A. Yes.

Q. Who did you talk to?

A. Mr. Stockley and the bookkeeper.

Q. When was that, about December the 10th?

A. I would say it was before that.

Q. How much before?

A. I had talked to them every day for 15 days previous to December the 10th, that is in general conversation. I [101] always made it a point to mention that this contract had not been received in time to have it recorded.

At the hearing held April 9th, the Referee made the following remarks:

The Referee: Now, there are one or two matters raised that I am not clear on—I am not clear on this

contract and its execution; from Mr. Biggy I gathered that the contract was signed down here on the date indicated before a notary, and I thought from what he implied that, right after it was signed, on November 10, 1944, he mailed it back to the Sacramento office. Now, on the other hand, it is quite clear from Mr. Henry's testimony that he was checking with his Sacramento office continuously and it didn't get there until December the 10th; was not received. That is one situation I would like to have cleared up, if there is anything on it.

As a result of said remarks another hearing was held on August 2nd, at which time Mr. Henry testified in part as follows:

Q. By Mr. Thomasset: Mr. Henry, I call your attention to what purports to be a lease contract which bears the date of November 10, 1944, and which has been admitted into evidence heretofore as Trustee's Exhibit 1, and which bears a recordation stamp dated December 18, 1944; that recordation stamp being or purporting to be that of the recorder of Calaveras County. Now, you have already testified in this matter and I want to call your attention to the notarial acknowledgment that is attached to that Exhibit 1, and ask you if you recall the occasion when that exhibit was acknowledged before the notary?

A. I recall the date when it was acknowledged.

Q. The notary appears to be N. W. Hicks, is that correct? A. That's right. [102]

Q. And it is Mr. or Mrs. or Miss. A. Mr.

Q. Does Mr. Hicks have a place of business anywhere?

A. Yes, sir, he has a place of business right across from 921 Del Paso Boulevard, North Sacramento.

Q. Did you, on the day that the notarial acknowledgment bears date, to-wit: the 12th day of December, 1944, appear before Mr. Hicks? A. Yes, sir.

Q. And did you have with you the lease contract which is marked Trustee's Exhibit 1?

A. Yes, sir.

Q. Now, when you appeared before Mr. Hicks, the notary, did the signature, Clyde Henry, president, under U. S. Machinery Company, on this lease contract, marked Exhibit 1, have at the time you appeared before the notary—had that signature been affixed to that instrument?

A. No, sir. I signed it in the presence of Mr. Hicks.

Q. So that this signature, Clyde Henry, appearing under the U. S. Machinery Company, and also in pen and ink below, the signature, Clyde Henry, president, was affixed by whom? A. By myself.

Q. And that is your signature? A. Yes.

Q. And you are the president of the U. S. Machinery Company? A. Right.

Q. On what date did you affix that signature?

A. On the 12th day of December, 1944.

Q. And you were acting in what capacity on that occasion?

A. As president of the U. S. Machinery Company.

Q. And for and on behalf of the U. S. Machinery Company? [103] A. Yes, sir.

Q. Now, did you on that occasion have any other instrument? A. Yes, sir.

Q. What?

A. I had this particular contract you are now looking at.

Q. Now, we are looking at the instrument which has been marked Trustee's Exhibit 2?

A. Yes, sir.

Q. And which bears on the reverse side of it a recodation of the recorder of Calavares County as of the 18th day of December, 1944, is that right?

A. Yes, sir.

Q. I will ask you to look at the signature, Clyde Henry, and then the word president underneath that, which has been written under the U. S. Machinery Company, at the bottom on Trustee's Exhibit 2, whose signature is that? A. Mine.

Q. Did you affix that yourself? A. Yes, sir.

Q. On what date did you affix that signature on Trustee's Exhibit 2?

A. On December the 12th, 1944.

Q. And in what capacity were you affixing that signature?

A. As president of the U. S. Machinery Company.

Q. And for *an* on behalf of the U. S. Machinery Company? A. Yes, sir.

Q. Now, on that occasion, do you remember whether it was in the morning or the afternoon, or what?

A. To the best of my recollection it was in the afternoon; I would say about 2:30.

Q. Were you accompanied by anyone else?

A. Yes, sir. [104]

Q. By whom?

A. Mr. Harry Satterfield.

Q. At the time that you appeared before Mr. Hicks, the notary, on the 12th day of December, 1944, with the instrument which has been marked Trustee's Exhibit 2,

had the signature of Clyde Henry, president, been affixed at that time?

A. No, sir, not previous to that.

Q. And it was, as you have testified, signed by you in the presence of the notary? A. Yes.

Q. And on that date? A. Yes, sir.

Q. Do you recall what you did, after these two exhibits, 1 and 2, were notarized by the notary? Were they returned to you?

A. Yes, sir, they were handed right back to me by the notary.

Q. And did you do anything in connection with those exhibits or copies of the exhibits, to the best of your recollection?

A. The copies of the exhibits I mailed to the Quartz Crystal Company, and the original I mailed to the recorder in San Andreas.

At the same hearing Harry Satterfield, produced by this petitioner, testified as follows:

HARRY SATTERFIELD

having been first duly sworn on oath, testified as follows:

By Mr. Thomasset:

Q. Your name is what?

A. Harry Satterfield.

Q. What is your address?

A. My business address? [105]

Q. Yes.

A. It has been 503 Van Ness Avenue, San Francisco, but that property has been sold and we have changed our address, but that is what it was at that time.

Q. Do you know Mr. Clyde Henry, who preceded you on the stand? A. I do.

Q. Do you recall being with him in Sacramento on an occasion in 1944? A. I do.

Q. I want you to look at these two instruments, one of them has been marked Trustee's Exhibit 1, and the other has been marked Trustee's Exhibit 2, each one has affixed to it a notarial acknowledgment, bearing the signature of N. W. Hicks, do you recall being in Sacramento with Mr. Henry at any time when you saw those exhibits?

A. I was in Sacramento at that time.

Q. You were? A. Yes, sir.

Q. And do you recall being at Mr. Hicks' place of business? A. Yes, sir.

Q. What kind of a business did he have?

A. A gasoline business.

Q. What does he have, an office there?

A. He has an office off to the side there.

Q. Do you recall the date, independently of these contracts?

A. Well whatever date that paper was—

Q. Do you remember seeing those instruments, by instruments I mean these two papers which have been marked Trustee's Exhibit 1, and Trustee's Exhibit 2. Now, let's take a look at Trustee's Exhibit 1, and I call your attention to the signature, Clyde Henry, president, underneath U. S. Machinery Company, did you see Mr. Henry affix that signa- [106] ture?

A. Well, I saw him take those papers in there while we were getting gasoline. They both of them signed, this gentleman, the notary, and Mr. Henry; I didn't know he was a notary at the time though.

Q. What about Trustee's Exhibit 2, calling your attention to the signature, Clyde Henry, president, under U. S. Machinery Company; were you present at the time Mr. Henry affixed that signature?

A. Yes, sir.

Q. Was that at the same time that the notary signed that acknowledgment?

A. They both signed.

Q. They both signed at the time?

A. Yes, sir.

Q. You were not exactly in the office were you when Mr. Henry signed?

A. No, I was sitting in the car.

Q. You were in the car; about how far away?

A. About 15 feet; the gasoline pumps and the car and then the office.

Q. When you say you saw Mr. Henry sign both of these instruments, what do you mean; what, if anything, attracted your attention?

A. As he got out of the car he had the papers; they looked like they were legal papers; I saw him take them out of his pocket and walk over to the office; I was in a hurry to get to San Francisco and they spent a lot of time in the office and I said, "What was all the time for?" And he said, "I have to get these signatures on this lease." At that time I was going to buy machinery, a shovel.

Q. You are in that kind of business? [107]

A. Yes, sir. I was trying to get a shovel, a tractor, and a bulldozer, and also a rooter.

Q. When he came back did you take a look at the contracts?

A. I said, "What did you take all of the time about?" and he said, "Here is the title on some of the machinery you wanted, but it is sold."

Q. Now, where these signatures apparently freshly written at the time you looked at them?

A. Yes, sir.

Q. Do you know what I mean?

A. Yes, they were fresh. They just was writing them.

Mr. Thomasset: That is all.

Q. By the Referee: You were in the car and he went into the office, a little room where the notary was, some 15 feet or so away? A. That is right.

Q. And then apparently he signed these papers and had the notary affix the seal? A. Yes, sir.

Q. And came back out? A. That's right.

Q. Well, you don't know anything about what the document showed or contained, do you? He didn't take the papers out of his pocket when he came back, did he?

A. No; when he came back, he said, "Here is some of the stuff you were trying to buy."

Q. But he had already sold it?

A. Yes, sir.

Q. Counsel's question seemed to imply that you saw these instruments and very carefully scrutinized them.

A. Well, I did take a look at some of the prices.

Q. The Referee: He showed you his contracts when he came back? [108] A. Yes, sir.

Q. And his signatures were already on them?

A. Yes, sir.

The Referee: I see. Any other questions?

Mr. Thomasset: No other questions.

Mr. Chichester: No other questions. The witness is excused.

(Thereafter other matters in this same case were taken up after which court was adjourned.)

Mr. Biggy, for the bankrupt, testified, in substance, that the bankrupt "executed" both of said agreements on November 14, 1944, and mailed them to the Sacramento office of this petitioner on that day.

With the foregoing before him the Referee held that the contracts were "executed" after the bankrupt had signed them and before the lessor had affixed its signature to the instruments.

It is the contention of this petitioner that such a holding is contrary to law and is based upon conclusions and inferences which the evidence does not warrant, and that therefore the order of the Referee, predicated upon the invalidity of the agreement, is erroneous and should be set aside.

II.

THE LAW:

Section 2980, Civil Code of the State of California, uses these words:

"Every conditional sales contract, lease, and bailment or feeder agreement covering live stock and other animate chattels and every conditional sales contract of equipment and machinery used or to be used for mining purposes, must be acknowledged, or proved and certified, and must be recorded within twenty (20) days after its execution . . ."

If this section applies, the word "execution" refers to the contract, and, it is submitted, does not mean the unilateral act [109] of the party who signs it constitutes "execution" of the contract.

On page 2 of the Referee's Certificate on Review, the Referee states (line 29):

"I found that the contracts were executed by the buyers on November 14, 1944, and were mailed to the office of the seller on that day." That is a reference to the unilateral act of one of the parties, the lessees. Incidentally the use of the word "buyer" is not supported by the evidence.

The word "execution" necessarily includes performance of three acts: signing, sealing, and delivery.

Williams v. Kidd, 170 Cal. 631, 650, 151 Pac. 1.

A contract, purporting to be made between several parties, containing mutual covenants of which those of one party are the consideration of the others, must, to be valid, be executed by all, and cannot be enforced against one executing, by another who fails to execute.

Emeric vs. Alvarado, 64 Cal. 529, 574, 577, 578, 579, 580, 2 Pac. 529.

According to the testimony of Mr. Henry, president of petitioner, after he signed both instruments on December 14, 1944, he then made a delivery by mailing a copy of each to the bankrupt.

The Referee, by his holding, has held, in effect, that after the bankrupt had signed the agreements, that the bankrupt could have enforced them against the lessor, petitioner herein, even though the latter had not signed

them. The Referee has produced no law to substantiate such a proposition.

We respectfully submit that the word "execution" as used in Section 2980 of the Civil Code, means signing by all parties and delivery after signing by all of the parties. There is absolutely no evidence here to indicate that any delivery was made of the lease agreements prior to the signing of said lease agreements by this petitioner, the lessor, on December 14, 1944. [110]

III.

REFEREE'S HOLDING OF INVALIDITY IS PREJUDICIAL:

If the contracts are not invalid under the provisions of Section 2980 of the Civil Code, then the whole of the Referee's decision, based upon invalidity, must fall and the rights of the lessor, based upon a valid agreement, rights of the lessor, have been infringed upon by the Referee's holding.

The lease agreements are dated November 10, 1944. Each provides that the lease shall not be construed as a sale and title to the property shall remain in lessor until all of the payments provided for are made and all of the conditions and terms fully complied with by the lessee, but, if all conditions and terms are complied with then after all payments are made by the lessee, at the election of the lessee, the lessor will deliver a bill of sale to the property upon the receipt of \$1.00. There are provisions also for the retaking of the property in the event of default, attachment, etc.

The lessee made rental payments to April 25, 1945. From that date on not a single rental payment has been

made despite provisions for monthly payments. In January, 1946, lessor elected to take possession of its property, to which it had title, and sold a portion of it to one P. De Michelis subject to delivery. There being difficulty in obtaining delivery petitioner instituted two actions of claim and delivery in the Superior Court for the County of Calaveras and proceeded to take possession of the property. While in the course of taking possession of the property and after taking possession of a part of it, the bankrupt, to forestall petitioner and defeat its rights, filed bankruptcy.

If the agreements are valid then entirely different results should flow from them than those which have been decreed by the Referee.

The law seems clear. [111]

Upon buyer's default, seller may retake possession of the property.

Smith v. Miller, 5 Cal. App. 2nd, 564, 43 Pac. 2nd 347.

Reservation of title in seller is valid against levying creditors of buyer.

Mohr vs. First National Bank of Hanford, 69 Cal. App. 756, 232 Pac. 748.

If the written agreement expressly declares that title shall remain in the seller, there would seem to be no basis for a contention that the sale was absolute and not conditional.

22 Cal. Juris. 1117, note 11, citing many cases.

Bice vs. Arnold, 75 Cal. App. 629, 243 Pac. 468.

Trustee in Bankruptcy does acquire title to goods in possession of bankrupt under conditional sales contracts but not paid for.

Bailly vs. Looch, 103 Cal. App. 220, 284 Pac. 236.

The retaking of possession prior to bankruptcy regains whatever interest the conditional vendor had in the property.

Jennings vs. Swartz, 86 Washington 202, 149 Pac. 947.

Title to goods delivered to bankrupt under an oral contract of conditional sale has been held not to pass on delivery though formal contract were not executed until after delivery.

Freedman vs. White, 22 Fed. 2nd 745.

The leases also provide:

“All previous communications between the parties hereto, either oral or written, with reference to said machinery or this lease, are hereby superseded and no modification hereof shall be binding upon the parties or either of them unless such modification shall be in writing duly accepted and approved by both parties. There are no representations, understandings or agreements outside of this lease.

Full agreement between the parties hereto is contained herein,” [112]

There is no evidence to support the findings of fact of any sale involving the property described in the leases. We submit that the findings of fact numbered 2 is totally unsupported by the evidence. The bankrupt certainly never contended at any time that it possessed the property involved under any other arrangement than that set forth in the leases. It took bankruptcy and the fertile mind of someone else than the bankrupt to advance any other theory. The latter, it is submitted, is unsupported either by the law or by the evidence.

If the contracts are valid then the order to the effect that U. S. Machinery Company, petitioner, has *nor* right, title, interest, lien or claim upon any of the personal property still in the possession of the Trustee is erroneous. On the contrary title would still remain in the lessor and the latter would be entitled to all of the relief prayed for in its petition for reclamation on file herein.

Respectfully submitted this 5th day of March, 1947.

CHARLES A. THOMASSET

Attorney for U. S. Machinery Company [113]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 5, 1947. [114]

[Title of District Court and Cause]

OPINION

Appearances:

Charles A. Thomasset, Esq., Attorney for U. S. Machinery Co., Los Angeles, California.

George T. Goggin, Esq., Attorney for Trustee, Los Angeles, California. [115]

Yankwich, District Judge:

On January 28, 1947, the Referee made an Order in the above matter upon the petition in reclamation of the U. S. Machinery Company in which the petitioner sought possession of certain machinery and equipment in the possession of the Trustee. The Order determined that the personal property was an asset of the bankrupt estate, that the petitioner was not entitled to its possession, and that it owed to the Trustee the amount of \$1331.85. The basis for the Order was that two agreements in writing entered into by the U. S. Machinery Company and the bankrupt dated November 10, 1944, and not recorded until December 18, 1944, were invalid under Section 2980 of the Civil Code of the State of California. This is a petition to review the Order.

The Referee in his certificate on review admits that the petitioner has correctly set forth his ground for review in this language:

“That petitioner alleges that each of said agreements was executed on December 12, 1944, and recorded on December 18, 1944, and is valid as to the Trustee herein and the creditors of this estate and that the said order, and the whole thereof, is er-

roneous and that the Honorable Referee herein erred in refusing to grant the relief prayed for in said petition for reclamation of this petitioner."

A study of the memorandum opinion which the Referee filed convinces me he arrived at the wrong conclusion, because he misinterpreted the meaning of the phrase "its execution" in Section [116] 2980 of the Civil Code of California, the material portion of which reads:

"Every conditional sales contract, lease, and bailment or feeder agreement covering live stock and other animate chattels and every conditional sales contract of equipment and machinery used or to be used for mining purposes, must be acknowledged, or proved and certified, and must be recorded within twenty (20) days after its execution in the office of the recorder of the county where the buyer, the party feeding, the lessee or the bailee, respectively, resides at the time he executes such contract, lease, feeder or bailment agreement, or in case the buyer, the party feeding, the lessee or the bailee is a non-resident of this State, in the office of the recorder of the county or counties where the property involved is located at the time the contract, lease, feeder or bailment agreement is executed by the buyer, lessee, or bailee or feeder, and a contract of conditional sale of equipment and machinery used or to be used for mining purposes shall also be recorded in every case in the county where the property is situated otherwise, it shall be void as to the lien or interest of the seller, the lessor, bailor or owner against bona fide purchasers, encumbrancers and those having no actual knowledge of the contract, lease,

feeder or bailment agreement who become creditors of the buyer, the party feeding, the lessee or the bailee, while said property is in the possession of any of the last mentioned parties.” (Emphasis added.) [117]

The Referee is not so much to blame because other California statutes, to be referred to, and bearing on the subject, and many of the cases to be cited herein were not called to his attention.

And here I must call attention to a fault which is apparent in many of these reviews, i. e., that counsel, who specialize in bankruptcy, especially those who appear for Trustees, seem to rely too much on general “equitable bankruptcy principles” contained in Collier and Remington, and pay too little attention to the fact that contractual rights in bankruptcy are determined by the laws of California and the decisions interpreting them. Some time ago, I had before me a review in which the Referee had determined that the Trustee had certain rights to an automobile because the bankrupt, being indebted to a bank on several obligations, made certain payments which were not applied to the automobile indebtedness. To my surprise, I discovered that, at no time, had the Referee’s attention been called to a section of the Civil Code of California (Section 1479) which permitted the bank to so apply the money.

In another matter, the point upon which the review turned was the effect and manner of service of process on a dissolved corporation. That, too, depended on California statutes to which the Referee’s attention was not called by either side. (California Code of Civil Procedure, 411(6)(a), Civil Code, Sec. 402(a).) [118]

In the case before us, the Referee was induced to disregard binding California law entirely. His memorandum opinion fully demonstrates this. For, while indicating why he disbelieved uncontradicted testimony as to the date of the execution of the instrument,—including (I assume) the stipulated testimony that the notary who took the signature of the officer of the U. S. Machinery Company would testify that the instrument was signed and acknowledged before him on December 12, 1944,—he proceeds to determine that the lease-contract violates Section 2980 of the Civil Code of California without referring to any cases interpreting the section or defining execution and ignoring, as will appear later, even those which were cited to him in the briefs. He bases his decision on his inferences from facts. As to the law, he contents himself with a reference to the rather nebulous “equity powers of the bankruptcy court” (Memorandum Opinion, page 6, line 24). Cases depending on statutory interpretation cannot be determined by general references to bankruptcy powers.

And now to the problem before us.

I advert to the fact that this is another of those cases in which the “security” was not one given to an outsider, but was given for a part of the purchase price. Consequently, the approach to the problem is that laid down by myself in *re Mercury Engineering Company, Inc.*, 1946, D. C. Cal., 68 Fed. Sup. 376, which was recently sanctioned by the Circuit Court of Appeals for the Ninth Circuit in *Citizens National Trust & Savings Bank v. Gardiner*, decided on April 28, 1947, and not yet officially reported.

It may well be that the object of this section, as I [119] stated some years ago, in *re* Great Western Petroleum Corp., 1936, D. C. Cal., 17 Fed. Sup. 247, 250, is to protect creditors against claims to property in possession of a bankrupt on the basis of which the creditors may have extended credit. But the fact here is, as in the Mercury Engineering Company case, *supra*, that the persons who claimed rights under the lease or conditional sales contract were the very persons who furnished the machinery which was not paid for. And so we come to the main question.

The Referee took the view that, because one party to this lease contract or the conditional sales contract,—the bankrupt—had signed and executed the instrument, this was “an execution” of the instrument within the meaning of the section. This interpretation disregards entirely the law of California. We do not need to speculate as to what “execution” means because Section 1933 of the Code of Civil Procedure, which has been in effect since 1872, tells us:

“The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.”
(California Code of Civil Procedure, Sec. 1933.)

The Courts of California and the Circuit Court of Appeals for the Ninth Circuit have held that this section means exactly what it says, i. e., it means subscribing not by one party, but by all the parties who are required to sign it and delivering it to the party for whose benefit it is made, or delivering it for record so as to make it notice to the world. In the case of a lease contract or contract of sale of personal property, delivery means de-

livery of the instrument, the lease contract, [120] to the lessee after it has been signed by both the lessor and lessee, whether it is to be recorded or not. And when an instrument which, on its face, shows that it was intended to be signed by several parties, is signed by one only of the parties to be bound, and is in the possession of others who are also supposed to sign it, there is no "execution" within the meaning of California law until all the parties have executed it and delivered it to the others or recorded it. (See, *McCarthy Co. v. Commissioner of Internal Revenue*, 1935, 9 Cir., 80 F. (2d) 618 and California cases cited at page 620.) This is also the general rule. (See, 33 C. J. S., Executions, page 120.)

In 17 C. J. S., Contracts, Section 62(a), pages 411-412, it is said:

"It is held in numerous cases that, where an instrument has been executed by only a portion of the parties between whom it purports to be made, it is not binding on those who have executed it. The cases so holding are usually those in which the parties executing the instrument would have a remedy by way of indemnity or contribution against the other parties named, which remedy is lost by the failure of such other parties to execute the instrument. The question as to whether those who have signed are bound is generally to be determined by the intention and understanding of the parties at the time of the execution of the instrument. The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition

that it is to be executed by the others, and, there-
[121] fore, that until executed by all, it is inchoate
and incomplete and never takes effect as a valid con-
tract, and this is especially true where the agree-
ment expressly provides, or its manifest intent is,
that it is not binding until signed.” (Emphasis added.)

In *Coen v. American Surety Company of N. Y.*, 1941, 8 Cir., 120 F. (2) 393, 397, it is said:

“Under these authorities the execution of a written contract includes three acts; (1) Signing and (2) unconditional delivery by the promisor and (3) acceptance by the promisee.”

In *Barber v. Burrows*, 1876, 51 C. 405, 407, one of the earliest California cases on the subject, it appeared that the instrument called for execution by four persons. Only three executed it. The Court, in a very brief opinion, laid down what has since been the law of California, by saying:

“The instrument of September 2, 1872, was never completely executed. It is evident upon an inspection of the writing itself that it was intended to be signed by all the parties to the contract upon which it was indorsed. These parties were the two principals in the contract and the two sureties upon the bond attached to and forming a part of the contract. It was signed by but three of these persons.” (Emphasis added.)

This principle was declared later in *Emeric v. Alvarado*, 1884, 64 C. 529, in a very elaborate discussion which continues for several pages (see pages 578 et seq.)—a

case which the Referee had before him. This case specifically lays down the rule that where an instrument shows on its face that it cannot become [122] effective unless signed by all parties, it is not executed until it is so signed and delivered. This doctrine finds sanction also in *Williams v. Kidd*, 1915, 170 C. 631, 650, where the Court says:

“Further, it is to be noted that ‘execution’ is a word of well-defined legal meaning, and is here employed with that meaning. ‘Execution’ includes effective delivery.”

In *Sparks v. Mauk*, 1915, 170 C. 122, 123, it is said:

“It is the undoubted rule that where the contract contemplates the execution of it by signing either party has the right to insist upon the condition, and mere acts of performance upon the part of one who has not signed will not validate the contract. *Tewksbury v. O’Connell*, 21 Cal. 60; *Spinney v. Downing*, 108 Cal. 666 (41 Pac. 797).”

(See also, *Jackson & Thomas v. Torrence*, 1890, 83 C. 523, 538-539; *Hartwell v. Ganahl Lumber Co.*, 1908, 8 C. A. 733; *Winter v. Kitto*, 1929, 100 C. A. 302; *Anthony Macaroni Co. v. Nunziato*, 1935, 5 C. A. (2d) 588.) The latest case on the subject is *Wilk v. Vencill*, 1946, 76 A. C. A., 806, 808, where very pithily Mr. Justice Doran says:

“The property described was owned in joint tenancy; the contract was signed by only one of the

owners, hence the execution of the instrument was incomplete. (Barber v. Burrows, 51 Cal. 404.) (Emphasis added.)

Of course, when a contract is executed by a party to be charged, there may be circumstances under which, as between [123] him and the party who did not sign, he may be held to it, especially when the other side has performed. But here we are not dealing with such a situation. We are dealing with a requirement which makes an instrument invalid unless it has been recorded within a certain time after "execution". So that in determining what "execution" means, we must look to the contract to see if it is unilateral or bilateral. A glance at the lease contract shows it to be the type of contract which would have conferred no rights on the bankrupt unless signed by the company which owned the machinery. The first sentence of the contract reads:

"The U. S. Machinery Company, hereinafter referred to as the Lessor, leases to Quartz Crystal Products Co., P. O. Box 4, San Andreas, California, hereinafter referred to as the lessee, the following machinery and equipment, for use in Calaveras County, State of California, to-wit:"

The contract contains the usual conditions, reserves title, recites that "the full agreement between parties is contained herein," and provides for signature by an agent

of the "U. S. Machinery Co." and for acceptance by the lessee in this form:

"Accepted: Quartz Crystal Products Co.
Raymond I. Biggy
John W. Buol
James F. Collins"

It is not disputed that Biggy, Buol and Collins, composing the Quartz Crystal Products Co., signed and acknowledged the instrument before a Notary on November 14, 1944. But they acquired no rights under it until it was also executed by the U. S. Machinery Company, the owner of the property. The record is [124] undisputed that it was signed by them and acknowledged before a Notary on December 12, 1944, and thereafter sent for recordation in the County where the machinery was located and actually recorded, at the request of the U. S. Machinery Company, on December 18, 1944. The Findings of the Referee to the contrary find no support in the record or in the law. The Referee seems to think that it should have taken only two or three days for the U. S. Machinery Company to have one of its officers execute the instrument and record it. He would, therefore, penalize them and deprive them of the benefit of the Section because of delay. I find nothing in the law of California or in Federal law which would warrant us penalizing the owner of property for delay in executing such an instrument. We are not dealing with a section of the type I had under consideration in re Mercury En-

gineering Co., supra, where I had to determine what is or what is not a "reasonable time." The Code Section under consideration has saved us the trouble. It has fixed the time,—twenty days "after execution." As "execution" means signing by both parties and delivery, without which the instrument was not effective, we cannot penalize the party whose property it was by insisting that when one party signed it, they should have signed it within two or three days. For that is not what the law says. The law says simply that it "must" be recorded within twenty days after "execution." The record shows that it was not fully executed until December 12, 1944, when the owner of the property, without whose signature the contract conferred no rights, executed the instrument. It was recorded six days after such execution. The [125] fact that, in the meantime, the bankrupt may have had possession of the property under this unexecuted contract does not alter the rights of the lessor.

It follows that the Referee interpreted the law incorrectly and that his order dated January 28, 1947, must be and is, hereby, reversed.

Dated this 6th day of June, 1947.

LEON R. YANKWICH

Judge

[Endorsed]: Filed Jun. 6, 1947. [126]

In the District Court of the United States
Southern District of California
Central Division

Honorable Leon R. Yankwich, Judge
No. 44274-Y Bkcy.

In the Matter of QUARTZ CRYSTAL PRODUCTS
COMPANY, a corporation,

Bankrupt.

ORDER ON PETITION FOR REVIEW

The Petition for Review of the Order of the Referee, dated January 28, 1947, upon the petition of reclamation of the U. S. Machinery Company, heretofore argued and submitted, is now decided as follows:

On the basis of the Opinion herewith filed, the said Order of the Referee, dated January 28, 1947, is reversed.

Dated this 6th day of June, 1947.

LEON R. YANKWICH
Judge

Counsel notified.

Judgment entered Jun. 6, 1947. Docketed Jun. 6, 1947. Book 10, page 521. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy.

[Endorsed]: Filed Jun. 6, 1947. [127]

[Title of District Court and Cause]

NOTICE OF APPEAL

To U. S. Machinery Company and Its Attorney Charles
A. Thomasset:

Notice Is Hereby Given that William I. Heffron, the Trustee for the Quartz Crystal Products Co., a limited copartnership composed of Raymond I. Biggy, John W. Buol and James F. Collins, Bankrupt, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order made and entered in the above-entitled bankruptcy matter on the 6th day of June, 1947, by the Honorable Leon R. Yankwich and from the whole thereof reversing the order of the Referee dated January 28, 1947.

Dated: This 2d day of July, 1947.

GEORGE T. GOGGIN

Attorney for Appellant

[Endorsed]: Filed Jul. 3, 1947. Mailed copy to Charles A. Thomasset. [128]

[Title of District Court and Cause]

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY UPON APPEAL

The appellant herein respectfully intends to rely upon the following points upon his appeal:

I.

That the conditional sales contracts between the bankrupt and the U. S. Machinery Company are invalid and void as to the Trustee and as to the creditors of the bankrupt under and by virtue of the provisions of Section 2980 of the Civil Code of the State of California, in that the said contracts were not recorded within the time prescribed in said Section.

II.

That the amount due the U. S. Machinery Company by the bankrupt under said contracts was the sum of \$2,368.15, and the receipt of \$3,700.00 by the said U. S. Machinery Company from the sale of the equipment under said contracts left a surplus due and owing to the Trustee and the estate herein in the amount of \$1,331.85.

Respectfully submitted,

GEORGE T. GOGGIN

Attorney for Appellant

[Endorsed]: Filed Jul. 14, 1947. [129]

[Title of District Court and Cause]

STIPULATION

It is stipulated that the original reporter's transcript of excerpts taken from proceedings in the above entitled matter may be submitted and transmitted in its original form to the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

It is further stipulated that the petition to reclaim property by U. S. Machinery Company may be in the form designated by the appellant and that portion that is being eliminated may have inserted the following:

Here is set forth the contract being Trustee's Exhibit No. 1 or No. 2, as the case may be.

Dated this 7th day of August, 1947.

GEORGE T. GOGGIN

Attorney for Appellant

CHARLES A. THOMASSET

Attorney for Appellee [135]

ORDER

Good cause appearing, it is hereby ordered that the above stipulation be and the same is hereby approved and it is accordingly so ordered.

Dated this 11th day of August, 1947.

LEON R. YANKWICH

Judge of the United States District Court

[Endorsed]: Filed Aug. 11, 1947. [136]

[Title of District Court and Cause]

STIPULATION

It is stipulated that the record of appeal herein shall contain the certificate of business fictitious firm name of the bankrupt herein which was filed April 6, 1946, and that the Clerk shall include said certificate in the record of appeal.

Dated: August 4, 1947.

GEORGE T. GOGGIN

Attorney for Appellant Quartz Crystal Products Co.

CHARLES A. THOMASSET

Attorney for Appellee U. S. Machinery Company

ORDER

Good cause appearing it is hereby ordered that the record of appeal herein shall contain the certificate of business fictitious firm name of the bankrupt herein which was filed April 6, 1946 and the Referee is hereby ordered to certify said certificate to the District Court.

Dated: August 11, 1947.

LEON R. YANKWICH

[Endorsed]: Filed Aug. 11, 1947. [137]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 136 contain full, true and correct copies of Debtor's Petition; Orders of Adjudication and of General Reference; Referee's Certificate on Review; Petition for Order to Show Cause and Restraining Order; Order to Show Cause and Restraining Order; Petition to Reclaim Property (Partial); Order to Show Cause; Amended Petition for Order to Show Cause; Memorandum of Opinion and Direction for Further Hearing; Order to Take Testimony of Pete De Michelis and Joe W. Zwinge; Answer to Interrogatories Propounded to Peter De Michelis on Behalf of U. S. Machinery Company; Memorandum Opinion; Findings of Fact, Conclusions of Law and Order re U. S. Machinery Company, et al.; Trustee's Exhibits 1, 2, 4, 5, 6, 7, 8, 9, and 16; Supplement to Referee's Certificate on Review; Respondent's Exhibit No. 1; Points and Authorities on Petition for Review of U. S. Machinery Company; Opinion; Order on Petition for Review; Notice of Appeal; Statement of Points Upon Which Appellant Will Rely on Appeal; Designation of Record on Appeal by Trustee; Appellee's Designation of Record on Appeal and two Stipulations and Orders re Record on Appeal which, together with Reporter's Transcript of Excerpts taken from Proceedings held on

April 19, 1946 and August 2, 1946, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$34.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 11th day of August, A. D. 1947.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke

Chief Deputy Clerk.

[Title of District Court and Cause]

Before Honorable Hubert F. Laugharn, Referee in
Bankruptcy

REPORTER'S TRANSCRIPT OF EXCERPTS
TAKEN FROM PROCEEDINGS HELD IN
THE ABOVE-ENTITLED CASE ON APRIL
19, 1946 AND AUGUST 2, 1946, BEING THE
TESTIMONY OF CLYDE HENRY AND
HARRY SATTERFIELD

Appearances:

Chas. A. Thomasset, Esq., 610 South Broadway, VA
9135, Los Angeles, California, Attorney for the U. S.
Machinery Company.

Geo. T. Goggin, Esq., 354 So. Spring Street, MU 2248,
Los Angeles, California, Attorney for the Trustee.

Quartz Crystal Products Company.

April 8, 1946, 2:00 p. m.

First Meeting; Order to Show Cause on Various
Parties.

(Excerpts from the Hearing.)

CLYDE W. HENRY,

having been first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Thomasset:

Q. Mr. Henry, you are the president of the U. S.
Machinery Company? A. Yes, sir.

Q. And the U. S. Machinery Company is the party
who executed the lease agreements here which have been
marked Trustee's Exhibits 1 and 2, do you know what I
have reference to? A. Yes, sir.

(Testimony of Clyde W. Henry)

Q. Those are two lease agreements dated November 10, 1944. Now suppose you take either one of them, may I have Trustee's Exhibit 1?

The Referee: Here they are.

Mr. Thomasset: May I step around there, please?

The Referee: Yes. This is one of them and here is the other.

Q. By Mr. Thomasset: I will show you Trustee's Exhibit 1, which is an agreement with reference to the sale of the 60 Caterpillar tractor, with a 10 foot dozer blade. [2*] How much has been paid under that particular agreement?

A. I can tell you the balance due on that rather than the balance that has been paid.

Mr. Thomasset: All right.

The Witness: Due as of February 10, 1946, \$849.67.

Q. That is on what contract?

A. The Caterpillar.

Q. As of February what?

A. February 10, 1946.

Q. Now, with reference to the agreement marked Trustee's Exhibit 2, which is the one that includes the trommel.

A. The balance due as of February 10, 1946, \$1,-622.48.

Q. Now, on Trustee's Exhibit 1, the last payment was made when? A. April 25, 1945.

Q. Now, with reference to the agreement of lease, marked Trustee's Exhibit 2, when was the last payment made? A. April 25, 1945.

(Testimony of Clyde W. Henry)

Q. How many payments were made on the agreement marked Trustee's Exhibit 2, that is the trommel.

A. Five payments.

Q. Were those five monthly payments?

A. Yes, sir.

Q. And on agreement marked Trustee's Exhibit 1, how many payments were made? [3] A. Five.

Q. Now, with reference to the agreement marked Trustee's Exhibit 1; I will change that, Trustee's Exhibit 2, you say there are five payments?

A. Yes, sir.

Q. Two of those payments were incomplete, were they not? A. Yes, sir.

Q. One was \$202.50 and the other was \$46.88, were they not? A. Yes, sir.

Q. So four complete monthly payments only were made on that agreement, is that right?

A. Just three complete monthly payments were made.

Q. I know, but if you add up those two partial payments they will equal one full payment, will they not?

A. No, sir, yes, they do. I beg your pardon.

Q. You have four complete monthly payments?

A. That's correct.

Mr. Thomasset: That is all.

By Mr. Goggin:

Q. Mr. Henry, Have you had any correspondence with the bankrupt company with respect to giving them credit in addition to the money that they actually paid, so far as their contracts were concerned? A. Yes, sir. [4]

(Testimony of Clyde W. Henry)

Q. On your statement you do not show the amount of money that you have credited to the company, do you?

A. I believe it is shown back here in contract number one, and this credit on the notes were allowed as credits for the bankrupt.

Q. What credit do you show?

A. It shows approximately \$249.00.

Q. What item is that?

A. "This note paid, and this note partially paid"; they were given full credit.

By Mr. Thomasset:

Q. Do you refer to this amount of \$46.88?

A. Yes, sir.

Q. How much was supposed to have been paid on that contract at that time? A. I would not know.

Q. Was it supposed to be \$249.98?

A. Yes, sir.

Q. You have only given credit of \$46.88, leaving a balance which you have not shown of approximately \$2,000.00? A. That is correct.

Q. So that statement there that there is approximately \$1,600.00 is not correct, is that right?

A. I would not say it was. This was taken from the books.

Q. By Mr. Goggin: But your books only reflect the actual amount of cash you have received and not the credit [5] you have given? A. I could not say.

Q. Well, look it over, this is your statement.

Q. By the Referee: Does your statement show any actual credit?

A. I believe this shows all of the credits, including the credit that was given.

(Testimony of Clyde W. Henry)

Q. By Mr. Goggin: What makes you draw that conclusion?

A. From the information given me by my bookkeeper.

Q. What is her name?

A. Mrs. Hoag gave this to me.

Q. That was a different bookkeeper from the one that was taking care of these books on February the 10th?

A. Yes.

Q. Are you familiar with the writing of the bookkeeper that was your bookkeeper on February the 13th, 1945?

A. Yes.

Q. I will show you a statement and ask you if you are familiar with that writing and if you know whose it is?

A. I believe it is Mrs. Hoag's writing.

Q. Were you present at the time she prepared that statement?

A. No.

Q. Did you give that statement to Mr. Biggy?

A. No. [6]

Q. Did you know whether your bookkeeper gave that statement to him?

A. No.

Q. Have you ever seen that statement before?

A. No.

Q. What did you say the lady's name was?

A. Mrs. Hoag.

Q. How long had she been your bookkeeper?

A. I imagine for about two years, for the U. S. Machinery Company.

Q. Now, she shows as of February 13, 1945, the balance due of \$1,992.64.

Q. By Mr. Thomasset: "When you say she shows," you are assuming something not in evidence; assuming that is a statement made by her, is that it?

(Testimony of Clyde W. Henry)

Mr. Goggin: I will introduce this in evidence as a statement made by Mrs. Hoag.

Mr. Thomasset: Object to it on the ground no foundation has been laid.

Q. By the Referee: Well, were there certain credits that you were to allow, Mr. Henry?

A. There were credits allowed them but I don't know the amount.

Q. Of what nature, was that property turned back?

A. No, these expenditures that the engineer testified had been made. They were allowed. [7]

The Referee: I believe since it has been admitted that these were entitled to be received as credit, then there should be a complete statement, and we will go into that.

Mr. Goggin: It shows a credit allowed on contract number 4774, that must be the tractor, \$2,500.00, of \$185.47, does that refresh your memory?

A. No. I have no knowledge whatever of this type of statement.

Q. By the Referee: What does that show the balance due as of February the 10th on the tractor?

A. It shows on the tractor—

The Referee: On the other, either one.

Mr. Biggy: \$1,162.00.

The Referee: The witness has testified it was only \$849.67, and on the other contract \$1,622.48.

Mr. Thomasset: We have certain notes here which have been introduced as to what the payments had been, and I imagine I shall have no difficulty in determining how much credit has been allowed.

(Testimony of Clyde W. Henry)

The Referee: We will let a statement come in and then if there is any question see if you can adjust it with counsel.

Q. By the Referee: Now, what happened to this equipment which you possessed?

A. It is stored at San Andreas to the best of my knowledge. [8]

Q. By the Referee: Has it been resold?

A. We had sold it directly, previous to the time of taking it off of the property and the man went up to take it and was stopped from doing so and I took it on our own initiative to recover it, in order that we could sell it.

Q. Is it being used now by the person to whom you agreed to sell it?

A. No. To the best of my knowledge it is being stored there.

Q. The deal is not to go through until you clear this matter up? A. Correct.

Mr. Goggin: Q. Did you sell that equipment, purportedly, on or about January the 5th?

A. I believe about that date. I could give you the exact date if I could refer to my notes.

Mr. Thomasset: All right.

Mr. Heffron: Mr. DeMichelis is in court, the man who bought this property.

Mr. Goggin: Q. Is he the man who removed the property?

Mr. Heffron: That is the information I have.

The Witness: It was January 7, 1946.

(Testimony of Clyde W. Henry)

Q. And you purportedly sold that to whom?

A. Mr. DeMichelis.

Q. For what price? [9]

A. I sold him the trommel machinery and the bulldozer for \$3,700.00.

Q. What did he pay you for that?

A. \$3,700.00.

Q. When was that?

A. At the time I gave him the bill of sale.

Q. And when was that? A. January the 7th.

Q. And that was before you had possession of the property.

A. That was our property at all times; before we had actual possession.

The Referee: Any other questions?

Mr. Goggin: I would like to examine Mr. DeMichelis, if we have time.

The Referee: We might have a few moments. You may step down, Mr. Henry.

(Thereafter, Mr. DeMichelis was examined and other proceedings were had.) [10]

Quartz Crystal Products Company.

April 9, 1946.

First Meeting of Creditors; Order to Show Cause on Various Parties.

(Excerpt Taken from Proceedings.)

CLYDE W. HENRY,

being first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Thomasset:

Q. Mr. Henry, I am now proceeding backward and taking the last things first. With reference to the pump, that has been the subject of testimony by Mr. Biggy and Mr. Collins, I am speaking now of the pump that accompanied the trommel. What kind of motor was that?

A. That was a 30 horsepower C. S. Westinghouse.

Mr. Goggin: I move the answer be stricken and object to the testimony on the ground that no proper foundation has been laid, whether or not the witness has ever seen the pump.

The Referee: You can bring that out on cross examination, he said that is what it was.

Q. By Mr. Thomasset: Mr. Henry, are you connected in any capacity with the U. S. Machinery Company?

A. Yes, sir.

Q. The U. S. Machinery Company is a corporation, is it not? A. Yes, sir. [11]

Q. What is your capacity?

A. I am the president.

Q. Have you any other capacity with reference to that corporation? A. You mean as general manager?

Q. Well, are you the general manager?

A. Yes, sir.

Q. Are you familiar with the equipment that is described in the lease which has been marked here Trustee's Exhibit 2, and that is the lease which covers the trommel and conveyor and the Byron Jackson pumping motor and

(Testimony of Clyde W. Henry)

the three-tooth rooter? Are you familiar with that machinery? A. Yes, sir.

Q. Were you familiar with it at the time the lease was executed?

A. Yes, sir, I had charge of the purchasing of it.

Q. Now that pump was for what purpose?

A. That particular pump that reference is made to, I inspected, to the best of my recollection, some time in the month of September in the year that this equipment was being made ready for the Quartz Crystal. The reason it was brought to my attention was it had been purchased or agreed to be purchased from another machinery company, at the cost of \$500.00, in the as is condition.

Mr. Goggin: Just a moment. I can not help but make a motion to strike this testimony and object to it as being [12] incompetent, irrelevant and immaterial and hearsay testimony and not binding upon the bankrupt of the trustees.

The Referee: This is the pump in question that was going to be purchased by another company?

The Witness: That is right, it was in our shop in Sacramento.

By the Referee: Q. Were you not going to buy it, if you had it, or were you?

A. It was on our floor and I didn't want to give the purchase order out for it until I knew where it was going and why.

The Referee: Well, I will overrule the objection. It does not really hit on this; but I will overrule the objection.

(Testimony of Clyde W. Henry)

Mr. Thomasset: Q. Will you describe it?

A. I was informed by Mr. Biggy and Mr. Luciendes that this pump was for the yard and that it had been accepted and been rejected by a—

Mr. Goggin: I move to strike that as hearsay.

The Referee: Yes. Just go ahead and tell what you know about it.

A. I said we were not going to purchase that pump unless it was sold, because pumps are an article you could have a hundred of and they still would not have the correct head or delivery, but they assured me it was sold.

The Referee: Q. Your two representatives? [13]

A. Yes, sir.

By Mr. Thomasset: In other words, the pump has to be considered with reference to its use.

A. Yes, sir.

Mr. Goggin: I move the testimony of the witness be stricken for the reason it is hearsay and not binding on the bankrupt.

The Referee: Well, I am going to overrule it. After all what we have here, Mr. Henry, is your contract which is clear, and then we have the testimony of the two parties who preceded you, who said that they said to your representatives, "We will have to have a pump that will do so and so," and they were assured that it would, and apparently it didn't produce, and then complications arose from there on. Your information is that from information you were given by your two salesmen who came in contact with these purchases, that they made an outright sale without any representations.

(Testimony of Clyde W. Henry)

The Witness: Your Honor, I can explain to you very easily why the pump didn't perform as they wanted it to.

The Referee: Yes, but it is your contention, I assume, from what your salesmen told you, that they took the pump and accepted it and there was no guarantee it would produce 1,000—

The Witness: Yes, my men represented to me it was satisfactory to the customer before I bought it.

The Referee: Go ahead.

The Witness: Later this matter was brought to my [14] attention by Mr. Biggy and I took it on myself to prove either the merits or dismerits of their claim, and when I went up there, and Mr. Collins demonstrated the pump to me, I learned it was partially a mud pump rather than a water pump. I am satisfied the pump they took out of my place would easily produce.

Q. By the Referee: Did you see the pump?

A. Yes, sir.

Q. At the time you saw it was it pulling 20 per cent of solids?

A. Yes, sir.

Q. What conversation did you have with him in that connection?

A. I was with Mr. Collins and had no conversation at all because that was previous to the time Mr. Biggy got in contact with me and tried to make the change.

Q. Well, did you make any observations that it was producing a thousand gallons a minute and would pull 20 per cent solids?

A. No, sir, I had no reason to. It had been changed and it was then producing 1,000 gallons to the 20 per cent solids.

(Testimony of Clyde W. Henry)

Q. Your opinion is that that pump as it was delivered, with the motor attached, lifting 50 feet would produce 1,000 gallons per minute? A. Yes, sir. [15]

Q. But they apparently hooked it up to produce solids in conjunction with it, and then it would not perform?

A. Yes, sir.

Q. So your position is that if the representations were made by your men that it would, with the hookup, produce a thousand gallons per minute, then that it would and could produce that amount? A. Yes, sir.

Mr. Thomasset: I will show you Trustee's Exhibit 14, which is a list of alleged expenses. Are you familiar with the work that was done on the pump and motor after it was delivered to the Quartz Crystal Company?

A. I am not too familiar, because I didn't go down to the pump itself, I am very familiar with the type of pump.

Q. And there is a payroll due on there?

A. Yes.

Q. And how much with reference to the payroll would it take to make the change?

A. I would say a mechanic and his labor could make that for about \$18.00.

Q. You are referring now to this item of \$36.15. You feel this work could be done for \$18.00?

A. Yes, sir, I do.

Q. Then there is the item of the pulley and the belt of \$69.43, what is your estimation of a reasonable value of that? A. About \$60.00. [15-A]

Q. And then the transportation item to and from San Francisco?

A. Well, the transportation from San Andreas would not amount to that.

(Testimony of Clyde W. Henry)

Q. Mr. Henry, I will now show you Trustee's Exhibit 1, which is the contract or lease agreement on the Caterpillar tractor and I ask you when that was signed by you on behalf of the U. S. Machinery Company?

A. That was signed on December the 12th, 1944.

Q. And I will show you Trustee's Exhibit 2, which is the trommel and so forth lease agreement, and ask you when that was signed on the part of the U. S. Machinery Company?

A. On the 12th day of December, 1944, I signed it.

Q. And prior to the 12th day of December, 1944, neither of the instruments or agreements had been executed by the U. S. Machinery Company, had they?

A. That is correct.

Q. Now, calling your attention to a telegram which has been introduced in evidence here from Mr. Biggy and has been marked Trustee's Exhibit 9, which is this telegram dated December 31, 1945, from Fallon, Nevada, addressed to Clyde Henry, 285 Seventh Street—

The Witness: Yes, I received the telegram.

Q. You recall receiving that telegram?

A. Yes, sir. [16]

Q. Now, did Mr. Biggy come to your office the Saturday following the sending of the telegram?

A. No, sir.

Q. Did you receive from Mr. Biggy any notice that he would be delayed beyond Saturday after receiving that telegram?

A. No, sir.

Q. And you made a sale, all of this equipment, on what day?

A. No, I didn't make a sale of all of this equipment. I made a sale of part of the equipment on the following

(Testimony of Clyde W. Henry)

Monday or Tuesday, I don't recall which it was; following the Saturday Mr. Biggy was supposed to come in.

Q. And Mr. Biggy came to your office, when?

A. Either the following Monday or Tuesday, I believe Tuesday.

Q. Well, when you say the following—

A. Following the Saturday he was supposed to show up.

Q. Did he come to your office before or after the sale? A. Afterwards.

Q. Now, you had a conversation with him at that time? A. Yes, I had quite a conversation.

Q. Did he say anything to you with reference to making any other payments that were then delinquent?

A. No, sir. He said he was still trying to finance [17] the project and that it was unfortunate that he had not notified me that he would be in later in the week. He said he had told Mr. Collins to notify me from Los Angeles that he would be delayed but unfortunately Mr. Collins had not notified me.

Q. Did you receive any notice from Mr. Collins?

A. No, sir.

Q. At the time Mr. Biggy came to your office, did he offer you any money? A. No, sir.

Q. Did he tell you he had any money to pay over?

A. No, sir.

Q. Now, prior to the sending of this telegram had you had other appointments with Mr. Biggy?

A. Yes. I had had many appointments with him.

Q. With reference to what?

A. With reference to getting the payments on this trommel.

(Testimony of Clyde W. Henry)

Q. And what happened?

A. Each time he felt he would find someone to finance this thing and get it going.

Q. Over what period of time did that occur?

A. From ten months to a year.

Q. And had he theretofore made appointments with you that he had not kept?

A. No, sir. He had kept all of his previous [18] appointments very promptly.

Mr. Thomasset: Now, your Honor, I am going to say that this is all, with this reservation; the agreement in the lease in both instances provides that the lessor may recover costs of recovering and attempt to recover the machinery. The testimony as to the expenses involved can only be introduced through other witnesses whom we did not get down today. Suppose we postpone that in the event it becomes necessary.

The Referee: Very well. If it becomes necessary suppose you submit written agreements of the actual outlay of costs in connection with the recovery. I don't believe that is necessary that we should go to the trouble of witnesses on that. If that point is necessary we can probably agree on that.

Mr. Thomasset: And if we can not agree I imagine we could have a hearing and have, your Honor, hear it?

The Referee: Yes; now as to the attorney fees, that probably would be a different situation.

Mr. Thomasset: We might have to take a deposition of that.

The Referee: I don't quite know the full theory of the trustee's case, but from the standpoint, Mr. Goggin, of the trustee's position, even conceding your position,

(Testimony of Clyde W. Henry)

the U. S. Machinery Company would or would not be a general creditor here?

(Here follows a general discussion between the court and counsel after which the examination of Mr. Henry is resumed.) [19]

Q. By the Referee: When did you resell the property? A. Your Honor, I would say—

Q. Do you have the contract with you?

A. No, sir.

Q. It was sold for cash, was it?

A. It was sold for cash.

Q. All of it? A. Yes, sir.

Q. When was that?

A. I would say the Tuesday following the Friday of the date Mr. Biggy was to come in.

Q. When was the date of that? Now here is a telegram that came from Fallon, Nevada, dated December the 31st. Now, we can figure out what day of the week December the 31st is.

The Witness: That would be a Tuesday, I think.

The Referee: Now, it says "Delayed here until Friday, will be in to take up Quartz Crystal Products obligation Saturday." Now, what is that Saturday?

A. Apparently that would be January the 5th. I would say either January the 7th or January the 8th I sold the bulldozer and the trommel.

Q. To whom and for how much?

A. To Mr. Pete DeMichelis.

Q. I think he was here, wasn't he?

Mr. Thomasset: Yes, your Honor, and he exhibited the bill of sale. [20]

Q. For how much?

(Testimony of Clyde W. Henry)

The Witness: \$3,750.00, I believe, either \$3,700.00 or \$3,750.00.

Q. That was f.o.b. at the mine?

A. Yes, right where it was.

Q. What was the reason for the delay in the execution of the contracts on your behalf?

A. Which contracts?

Q. Exhibits 1 and 2, the original ones.

A. They were mailed to Mr. Biggy and they got back to our office on or about December the 10th and I signed it on December the 12th and we mailed it to San Andreas to be recorded.

Q. They bear date of November the 10th, 1944, and a notarial acknowledgment on November 14, 1944, and then the notarial acknowledgment of your secretary December 12, 1944. You are of the opinion that the signed contracts by the buyers were not received back in your office until about December the 10th?

A. That is right.

Q. And you thereupon signed them and recorded them on December the 8th, 1944. Did a letter accompany them?

A. That I could not say because they telephoned me in San Francisco that the contracts had been received and I went to Sacramento and signed them.

Q. When was the down payment made on the contracts [21] which are dated November the 10th, 1944?

A. That I could not say.

Q. When was the property delivered?

Mr. Goggin: The checks are in evidence, your Honor.

A. Well, the main part of it was not delivered until after Christmas, I am sure of that because it was brought to my attention that they were very slow on delivery. It

(Testimony of Clyde W. Henry)

is fixed in my mind that it was at Christmas time that I went to Sacramento in an effort to speed up delivery to the Quartz Crystal.

Q. Now, here is also an invoice, two invoices, the sales invoice of some kind—a trommel and pump on October the 4th, 1944, and one for a Caterpillar, October the 4th, 1944.

A. Well, originally part of that was to be paid by cash but later the entire deal was changed.

Q. Here is a check September the 22nd, 1944, for \$100.00, and here is another September the 26th, 1944, for \$625.00, that is noted "Initial payment, Caterpillar Tractor," and here is another dated November the 8th, 1944, "Initial installment on mining equipment for \$834.02, and another of \$8.28, dated November the 8th, 1944; November the 18th, \$311.30, balance due on initial contract"; December the 9th, 1944, \$193.75, "December the 14th, 1944, payment on lease contract"; and December the 16th, 1944, \$70.60. Do you have a recollection of those? [22]

A. That was the amount of the original negotiations. The pump and some of this equipment was to be bought outright and bought for cash, then the deal was changed from time to time until it was finally all put on a lease contract.

Q. I am showing you Trustee's Exhibit 5, that is one of your usual forms? A. Yes, sir.

Q. And the contract says, "Balance payable 10 payments of \$249.08 monthly," that is dated October 4, 1944, what is the full sales price?

A. \$3,640.00 on this particular one.

(Testimony of Clyde W. Henry)

Q. And then there is some tax item added?

A. Yes, sir.

Q. Then what were they to pay down?

A. That would have been according to this, if it had been paid.

By Mr. Goggin: Q. Do you know who forwarded or sent the contracts, Exhibit 1 and 2, to the Quartz Crystal Products Company?

A. Either Mr. Stockley or Mr. Euciendes.

Q. Isn't it a fact that at that time the contract, Exhibit 1, dated November the 10th, 1944, was sent to Quartz Crystal Products Company that that was already signed by Mr. Stockley on behalf of the U. S. Machinery Company?

A. Mr. Stockley had no authority to sign contracts.

Q. That is not the question. Will the reporter please [23] read the question.

(Thereupon the last question was read by the reporter.)

A. To the best of my knowledge it had not.

Q. Do you know Mr. Stockley's signature?

A. No, sir.

Q. You don't? A. No, sir.

Q. How long was he an employee of yours?

A. About six months.

Q. Directing your attention to the exhibit, do you know who struck the name of Stockley off the contract?

A. No.

Q. Did you? A. No.

Q. You did not? A. Not to my knowledge.

Q. Not to your knowledge? A. That's right.

(Testimony of Clyde W. Henry)

Q. When did Mr. Stockley leave your employ?

A. I could not tell you the exact date. I believe it would be some time in the early part of 1944.

Q. Do you know his writing at all?

A. No, I don't.

Q. Have you ever seen it? A. I might have.

Q. How many contracts were prepared on this transaction? [24] A. I have no actual knowledge.

Q. Was there more than one?

A. When you say contracts, do you mean contracts of this type?

Q. Yes. A. I could not just say.

Q. Who would know in your office?

A. Mrs. Hoag would know. She was the bookkeeper at that time.

Q. By the Referee: Well practice would dictate one for you and one for the buyer, would it not?

A. That is correct, your Honor.

Q. Unless you would have to have another one for some purpose or other. Now, when you send something to the County Recorder's office it takes weeks to get back?

A. Some things; only some times when it arrives at the County Recorder's office they make a note of it and then make it as of that date.

Q. Oh, yes, but I thought may be there were more.

A. There are, Mr. Thomasset has a copy.

Q. By Mr. Goggin: Now, you say you received contracts back about December 10th?

A. That is correct.

Q. How do you fix that date?

A. Because I had brought pressure on the Sacramento [25] office to have this contract drawn right and have it

(Testimony of Clyde W. Henry)

recorded, because it had come to my attention that this outfit was not too reliable.

Q. Did you contact them from Sacramento?

A. Yes.

Q. Who did you talk to?

A. Mr. Stockley and the bookkeeper.

Q. When was that, about December the 10th?

A. I would say it was before that.

Q. How much before?

A. I had talked to them every day for 15 days previous to December the 10th, that is in general conversation. I always made it a point to mention that this contract had not been received in time to have it recorded.

Q. Had you received at or about that time, the note which evidenced the payment on the contract?

A. That I could not say. The note would be attached to the contract.

Q. And had you known that at or about that time you had received on the contracts approximately \$2,000.00?

A. I didn't know the exact amount we had received but I knew they had received money on the contracts, yes, sir.

Q. And up to December the 9th, I show you Exhibit 3, which checks appear to have your endorsement thereon, if you will look at them, they will appear to be approximately \$2,000.00, will they not? [26]

A. Yes, that is correct.

Q. So then on or about December the 10th, when you were in San Francisco you received the contracts then?

A. No, sir. I received a telephone call that the contracts had been received.

(Testimony of Clyde W. Henry)

Q. Where did you receive that?

A. In my office in San Francisco.

Q. Then what did you do?

A. I went to Sacramento.

Q. Then what did you do?

A. I signed the contract and had it notarized.

Q. By whom did you have it notarized?

A. I believe the man across the street.

Q. He was no employee of yours? A. No.

Q. Did you think it was necessary to have your signature notarized?

A. I knew it was absolutely necessary.

Mr. Goggin: I see.

Q. Since the court asked you a question about whether or not a letter accompanied the sending and delivering of these contracts, and your answer was that you didn't know.

A. That is correct.

Q. Did you make any inquiry about it at your Sacramento office? A. No. [27]

Q. As a matter of fact, Mr. Henry, those contracts were in your Sacramento office shortly after November 14th, 1944, were they not? A. No, sir.

Q. You are quite sure of that? A. Yes.

Q. Did you make any search for them in your office?

A. No, sir.

Q. And you say you contacted whom?

A. Mr. Luciendes, Mr. Stockley, and Mrs. Hoag, the bookkeeper.

(Testimony of Clyde W. Henry)

Q. Did they advise you that they had sent any correspondence to the Quartz Crystal Products Company with respect to them?

A. I could not say. They said they were doing every thing to get them so we could have them, and they could be recorded.

The Referee: I think at this time we will take a recess.

(Thereupon a recess was taken after which the witness, Clyde Henry, resumed the stand and the following proceedings were had):

Q. By Mr. Goggin: Now, when did you say that you first made demand at your office in Sacramento to get the contracts?

A. It would be impossible to say the date but I would [28] say no less than a half a dozen times previous to December the 10th, 1944.

Q. A half a dozen times? A. Yes.

Q. How long would that be, a week, ten days, or what, that is the first time you made demands for them?

A. I used to talk to Sacramento often, not less than four or five times a day on different matters and as I testified, I had the pressure on to get this contract consummated.

Q. When was the first time you told the Sacramento office to get the contracts?

A. I would say, to the best of my memory, November the 25th or 26th.

Q. And you personally made no contact with the Quartz Crystal Products people? A. That is right.

(Testimony of Clyde W. Henry)

Q. Now, you said the reason that you were putting the pressure on was because you had learned of their financial responsibility, that it was not too sound?

A. I had been told by some of the dealers that it was not too good, that is correct.

Q. Now, on a direct question from the court you stated that the delivery of this equipment was not had until about December the 21st, how do you explain that?

A. I have reference to the main part of the equipment, [29] I believe that was the trommel and the stacker.

Q. In other words, on or about December 25th you still had possession of the major portion of this equipment?

A. That I could not say but I know the deal was not completed. I don't know whether it was the Quartz Crystal people who contacted me or my own people, but they were dissatisfied with the delivery; that they wanted that stuff delivered.

Q. When did you sell out your business in Sacramento?

A. I believe about six or seven months ago we sold out the Sacramento business.

Q. When did you have the auction up there?

A. We had three or four at different times.

Q. When was the first one?

A. The first one I think was in 1941 or '42.

Q. When was the next one? A. About 1943.

Q. And the next one?

A. Then we had two more. I believe one was 1944 and one was in 1945. That is we had two separate locations in Sacramento, one at 1800 20th Street and one at 921 Del Paso Boulevard.

(Testimony of Clyde W. Henry)

Q. Now, you sold out the principal part of your business in November, 1944, in Sacramento?

A. No, sir, we sold out the principal part of our business in 1945. [30]

Q. When in 1945?

A. I can not tell you the exact date, I would have to refer to my records.

Q. Now, you said that you sold only a part of the equipment that was on the conditional sales contracts purportedly to Pete DeMichelis. A. Yes.

Mr. Thomasset: There is no such testimony.

Mr. Goggin: I will strike the "purportedly."

Mr. Thomasset: I am not objecting to the "purportedly"; I am objecting to the conditional sales contract.

Q. You sold it for cash? A. Yes, sir.

Q. By Mr. Goggin: And you received cash?

A. Either \$3,700.00 or \$3,750.00.

Q. That was paid to you by cash or by check?

A. By cash.

Q. And at that time there was due on the entire contract, pursuant to our stipulation not more than \$2,214.15 plus interest? A. That is correct.

Q. How much did you sell the Caterpillar for?

A. The Caterpillar was included with the trommel in the \$3,750.00.

Q. Was there a breakdown at all?

A. No, sir. [31]

Q. What part of the equipment did you not sell?

A. Pump and the three tooth rooter.

Q. Where was the three-tooth rooter?

A. That I could not say.

(Testimony of Clyde W. Henry)

The Referee: Now to keep the record straight, there is certain equipment that is identified in the two contracts. That property which you sold was the trommel and the Caterpillar? A. Yes, sir.

Q. And the rest you did not sell?

A. That is correct.

Q. Or remove? A. That is correct.

Q. Unless the sheriff removed it?

A. That is correct.

Q. That is, it did not come into your possession or any of your agents? A. Correct.

Mr. Goggin: Q. Now, all of the equipment you purportedly sold to DeMichelis was not taken off the property, was it?

A. The Caterpillar was removed and the belt I believe, and some minor equipment.

Q. Was the trommel? A. Correct.

Q. You at one time made a valuation of the equipment, did you not? [32] A. Yes.

Q. What was your evaluation?

Mr. Thomasset: I will object to that as immaterial.

The Referee: As of what time, or what is this Mr. Goggin, do you mean at the time the suit was filed?

Mr. Goggin: On or about November the 1st, 1945.

Mr. Thomasset: We will object to that.

The Referee: Overruled. I don't know. This is preliminary apparently to something. You can have a motion to strike if it is not tied in.

A. You have a letter there, if I could look at that letter it would refresh my memory, because a lot of things happen in this work and I could be mistaken.

(Testimony of Clyde W. Henry)

Mr. Goggin: I imagine you refer to this (hands instrument to the witness.)

The Witness: A. I remember this letter very well.

Q. You wrote that letter?

A. Yes, I wrote that letter.

Q. And who is Mr. Gottsfield?

A. I don't know.

Q. He is the person who Mr. Biggy was discussing the purchase and sale of the entire property to, was he not?

A. He is the gentleman Mr. Biggy asked me to write this letter to.

Q. And isn't he the gentleman who advised you by telephone he would pay off the entire contract?

A. That is a misstatement. He is a gentleman who [33] advised me he had made no arrangements to pay off the contract.

Q. Did you talk to him? A. Yes.

Q. When?

A. On the Tuesday following Mr. Biggy's visit to my office following the sale to DeMichelis.

Q. Now, as a matter of fact, the bill of sale you gave to DeMichelis was dated around January the 15th, wasn't it? A. It could be.

Mr. Thomasset: We have a record of it. It was read into the record by your Honor.

The Referee: Let's see if I made a note of it. Of course, the reporter's record would be more reliable.

Mr. Thomasset: He said he might want to sue someone and we asked that that contract be left and I could not get him to leave it.

(Testimony of Clyde W. Henry)

The Referee: (Reading) "DeMichelis, Railroad Flat, Calavares County, California, January the 15th, took possession. Caretaker gave me the keys and I moved the equipment. Paid \$3,700.00."

Mr. Thomasset: That is what he said?

The Referee: "Everything but the tractor moved by four o'clock, tractor removed between four and six." Now, I have January the 15th is the date which he took possession. I don't know about the bill of sale. We did make reference to it when it was produced and I read it into the record. [34]

Mr. Thomasset: I think that is correct, your Honor.

The Referee: Is it your recollection that it bears the date of January the 15th?

Mr. Goggin: Yes, your Honor, he had it acknowledged, as I recall, on or about that date.

Mr. Thomasset: Oh, yes, I think it is dated, according to my note, January the 8th. My notes are a bit ambiguous so I would not state that positively, but I do recall that he stated later on that he had it acknowledged because he might have to use it.

By Mr. Goggin: Q. Now, getting back to this conversation with Mr. Gottsfield, was Mr. Biggy in the office at the time you talked to him? A. No, sir.

Q. Was Mr. Biggy present at any time when you talked with Mr. Gottsfield?

A. Not that I know of.

Q. When Mr. Biggy was in your office on January the 7th or 8th didn't he advise you at that time that he had sufficient money to pay off your contract in full?

A. He did not. He advised me that he had hoped to get some money.

(Testimony of Clyde W. Henry)

Q. And isn't it a fact that Mr. Biggy told you he could sell the tractor and pay off the entire amount that was due you? A. It is not a fact. [35]

Q. What was your opinion of the value of the tractor on or about January 8th?

A. I would say the tractor at that time was worth about \$1,700.00.

Q. What was your opinion as to the value of all of the equipment on the mine?

Mr. Thomasset: Which equipment do you mean; that covered by the leases or what was at the mine?

Mr. Goggin: Everything that is covered by the leases.

A. Well, in order to be specific, when you say covered by the leases, is that our leases?

Q. Yes. A. The pump and the trommel and—

The Referee: Let me suggest a change in that question.

Mr. Goggin: Very well. I will withdraw the question.

Q. By the Referee: Do you have an opinion of the value of the equipment that you sold on these contracts here, which remains and which you did not sell to Mr. DeMichelis? A. Yes, sir.

The Referee: I am excluding the trommel and tractor for the purposes of discussion. What is the value of the remaining property?

A. The value of the pump and motor and rooter, I would say, was about \$1,000.00.

The Referee: You were showing the witness some letter, I don't think it was offered. Did you intend to offer it? [36]

Mr. Goggin: Well, I was just asking as to his opinion of the value.

(Testimony of Clyde W. Henry)

Q. By Mr. Goggin: Now, what was your opinion as to the value of all of the equipment that was located on the Quartz Crystal Mine?

Mr. Thomasset: That question is ambiguous.

The Referee: Yes.

Mr. Goggin: Showing you a letter dated November 1, 1945, signed by yourself and addressed to Mr. Gottsfield, wherein you stated that in your opinion the value of the Quartz Crystal Mining equipment, located near Calavares, California, "My estimate of the value of the plant would be \$35,000.00, and I would state further that the equipment should bring not less than \$18,000.00 to \$19,000.00 at a forced sale."

A. I wrote this letter at the request of Mr. Biggy to help him raise money to pay off this equipment. I don't know what was on there on November the 1st; however, I do know at the time I inspected the Quartz Crystal property, when all of the equipment was on there and in running condition, I would say it was as I stated in this letter, that it should bring \$18,000.00 or \$19,000.00 at a forced sale.

Q. And was that your opinion on or about January the 8th?

A. I don't know what was there on January the 8th.

Q. When was the last time you were on the lease?

A. I imagine sometime in August or September. Anyway, [37] it was previous to the time the Quartz Crystal had shut down operations.

Q. Did you go up on the property subsequent to November 1, 1945?

A. No, sir.

(Testimony of Clyde W. Henry)

Q. And you don't know whether any of the property was removed after November 1, 1945, or not?

A. That is correct.

The Referee: That leaves me somewhat confused, because you have referred to all of the property, and of course we are only concerned with this property under the two contracts.

Mr. Goggin: I was going to ask him, what part of the equipment—

The Referee: Well, the question really is, is it not, from someone who could identify it, if it is important, what equipment was there on the mine other than that under these two contracts, because he is apparently giving the overall. I don't quite see the connection here unless he knew what that other equipment was.

Mr. Goggin: Maybe I can clear that up.

Q. What was your opinion of the value of the equipment covered by your conditional sales contracts, dated November 10, 1944, on November 1, 1945, arriving at the total valuation of \$35,000.00.

Mr. Thomasset: I object to that, it is ambiguous.

The Referee: Yes. Afterall, here is what I gave so far: [38] He sold the Caterpillar and the trommel for \$3,700.00. We will take that as the value. That is a good indication for the time being. Then you asked him what was his opinion of the other property and he said \$1,000.00. That makes \$4,700.00.

Mr. Goggin: The point is this: Mr. Collins testified that the value of that equipment was \$9,000.00 on or about January the 8th, and according to this witness' testimony, it would be \$4,700.00, and I was attempting to have his opinion as of November the 1st, as to whether

(Testimony of Clyde W. Henry)

or not he has changed it from that date, and whether or not it was around \$9,000.00, as I understand his statement to have been to a certain person. Of course, I appreciate the fact if you sell a certain piece of equipment and get cash for it—

The Referee: If the point was material here and I was trying to find out what the situation was up there, I would call Mr. Collins and ask him what pieces of property of every kind and character was on the mine on November the 1st, in addition to this contract prepared by Mr. Henry, or the U. S. Machinery Company. I assume there was some other property. And then he might be able to give an idea of its value or cost, if it was expensive.

Mr. Goggin: That would be our rebuttal.

The Referee: Yes. Well, this witness—unless he knows exactly what was there.

Q. By the Referee: When you put the estimate on the plant, and that I assume was a going plant, the machinery [39] up there on November the 1st, what generally was there in addition to the property under your contracts?

A. As near as I can recall, there was a station wagon, one yard shovel, and I believe two dump trucks, a machine shop complete, and an assay room and welding equipment, and the equipment we had sold these people, all installed.

Q. In other words, a complete—

A. A complete going operation, your Honor.

Q. By Mr. Goggin: Now, on January the 7th or 8th, when Mr. Biggy came into the office, did you tell

(Testimony of Clyde W. Henry)

him the amount of money you were selling the Caterpillar and trommel for? A. Yes.

Q. And did you tell him at that time that would pay up his account and you would turn over to him the balance of the money? A. No, sir.

Q. Did you make any offers subsequent to that date?

A. Yes. I told Mr. Biggy if it was possible at all for him to get his finances, I felt he could make a deal with Mr. DeMichelis and carry on his operation up there, that I had requested Mr. DeMichelis not to remove the equipment immediately; in fact, I called him after Mr. Biggy was in my office and Mr. Biggy said he would contact Mr. DeMichelis and try to make a deal with him.

Q. Do you remember the price or figure that was quoted? [40] A. No, sir.

Q. Was it \$4,750.00?

A. I believe \$4,750.00 was mentioned as the amount that Mr. DeMichelis would take to leave the whole equipment there and get his equipment somewhere else.

Q. And that state of facts existed up to the time when you filed this action in claim and delivery did it?

A. No, sir. When Mr. Biggy didn't contact Mr. DeMichelis, Mr. DeMichelis notified me he would have to have the equipment and would hold me responsible to go ahead and deliver it to him.

Q. When was that, about January the 15th?

A. That would be about then.

Mr. Goggin: I think that is all.

The Referee: Any other questions?

Mr. Thomasset: I was looking at the dates that these actions were filed in Calavares County, for claim and delivery. I think it was around the 21st of February.

(Testimony of Clyde W. Henry)

Q. By Mr. Thomasset: Mr. Henry, are you familiar with any Federal Regulations as to nonpayments on machinery of this type sold under the deferred payment plan or lease plan?

A. Yes, sir, I am familiar with the Federal Law on down payments on a lease contract, yes, sir.

Q. And what is that?

Mr. Goggin: Object to that as incompetent, irrelevant [41] and immaterial, and a self-serving declaration, and not the best evidence. If there is a regulation, the regulation is the best evidence. I suppose it requires a one-third down and the balance over a period of time.

Mr. Thomasset: That is right. Will you so stipulate that I can so prove it without introducing anything except the conversation of the parties.

Mr. Goggin: I think the contracts call for one-third down but there was a regulation to that effect, was there not? A. Yes, sir.

The Witness: Yes, sir but I had a conversation with Mr. Biggy.

The Referee: How is that going to affect the record?

Mr. Thomasset: We have scattered payments and these have been gone into by your Honor, yourself.

Q. Mr. Thomasset: When did you get the balance of the one-third down?

A. At the time I signed the contract.

Q. Do you want to take a look at these records here and determine when you got that?

The Referee: I see. That explains the reason for some of those checks being prior to the date of the contract.

Mr. Thomasset: Yes, your Honor.

(Testimony of Clyde W. Henry)

Q. Mr. Thomasset: Now, take a look at these checks, can you tell what checks represent the balance of the one-third [42] down payment?

Mr. Goggin: There are two contracts, counsel.

Mr. Thomasset: They both bear the same date and I don't think they are segregated here.

Mr. Goggin: I think if you will look carefully you will find the differential.

The Witness: This is the check I received.

Mr. Thomasset: Q. You are indicating check number 260, dated September 9, 1944, for \$193.75.

A. That is correct.

Q. When did that reach you?

A. On December the 10th.

Q. With anything else, that you recall, at that time?

A. With the contracts. When I say reached me, they were in the Sacramento office and they were handed to me.

Q. Now, with reference to the deal with Mr. De Michelis, was there any conversation with him as to delivery?

A. Yes, there was quite a bit of conversation with Mr. DeMichelis as to the delivery, do you want me to explain?

Mr. Thomasset: Yes. I want to know whether at the time you made the sale or agreement—

A. I showed Mr. DeMichelis the contracts we had with the Quartz Crystal Company, and I also showed him a wire from Mr. Biggy, that Mr. Biggy had given up the property.

(Testimony of Clyde W. Henry)

Q. I am asking you for a conversation with reference to delivery. [43]

A. I can not say but I take it I promised him immediate delivery, or inferred he could have immediate delivery, because it was our equipment.

Q. Was there any conversation with him as to whether you were going to provide the delivery, or what?

A. He was to pick it up but I gave him the bill of sale as a guarantee that the equipment was mine and that I would make delivery to him.

Q. So it was subject to delivery?

A. Yes, sir. I also explained to him that that was the contract and should there be any delay, that I would not want to be held responsible for it and he acquiesced in that.

Mr. Thomasset: That is all, I think.

Q. By The Referee: Did you have any conversation with him or discuss with him the possibility of after your taking his \$3,750.00 that the Quartz Crystal might not want to release the equipment and might pay you the balance, or any thing of that sort?

A. No, your Honor, I told him that the time had long past that they could legally make any payment or have any claim on the equipment, but it had been our experience in years gone by, especially where people had contracts, with mine owners, they frequently will put in, if they don't meet certain obligations, the machinery will belong to the mine owners: we have had that happen many times and we have always had to go and put up a bond and have an attorney get the equipment for us. [44]

(Testimony of Clyde W. Henry)

Q. I thought when you were here before you said you told Mr. DeMichelis you really were not selling it to him, it was conditioned upon your being able to get it, I don't remember exactly what it was, but you had some qualification so that if you didn't get delivery of it, Mr. DeMichelis could not hold you.

A. That was the point. I didn't want to obligate ourselves.

Q. If there was something of that sort then Mr. DeMichelis was not to be able to hold you and sue you for nondelivery?

A. That was my point.

Q. And you could give back the \$3,750.00?

A. That's correct.

The Referee: Any more questions?

Mr. Thomasset: No more questions, your Honor.

Mr. Goggin: That is all.

The Referee: Now, there are one or two matters raised that I am not clear on—I am not clear on this contract and its execution; from Mr. Biggy I gathered that the contract was signed down here on the date indicated before a notary, and I thought from what he implied that, right after it was signed, on November 10, 1944, he mailed it back to the Sacramento office. Now, on the other hand, it is quite clear from Mr. Henry's testimony that he was checking with his Sacramento office continuously and it didn't get there until [45] December the 10th; was not received. That is one situation I would like to have cleared up, if there is anything on it. It is more or less of a void; and the other thing is the conversation between Mr. Henry and Mr. Biggy in connection with this appointment, which apparently was not kept, and then also the third

(Testimony of Clyde W. Henry)

point, whether or not this pump was raising 20 per cent solids with the liquid. Let's see if we can clear that matter up by 4:30. (Thereafter Mr. Biggy took the stand and testified until court was adjourned.) [46]

* * * * *

Quartz Crystal Products Company

August 2, 1946, at 2:00 p. m.

Order to Show Cause in Reclamation

(Excerpts from Proceeding)

CLYDE W. HENRY

being first duly sworn, on oath testified as follows;

Direct Examination

By Mr. Thomasset:

Q. You have appeared here before and testified?

A. Yes, sir.

Q. And you are the president of the U. S. Machinery Company? A. Yes, sir.

Mr. Chichester: I would like the record to show I am appearing as co-counsel with Mr. Goggin, and that he has handled all of the proceedings heretofore, and he is ill, and I am not too familiar with the proceedings but I will do my best under the circumstances.

The Referree: All right.

Q. By Mr. Thomasset: Mr. Henry, I call your attention to what purports to be a lease contract which bears the date of November 10, 1944, and which has been admitted into evidence heretofore as Trustee's Exhibit 1, and which bears a recordation stamp dated December 18, 1944; that recordation stamp being or purporting to be that of the recorder of [47] Calavares

(Testimony of Clyde W. Henry)

County. Now, you have already testified in this matter and I want to call your attention to the notarial acknowledgment that is attached to that Exhibit 1, and ask you if you recall the occasion when that exhibit was acknowledged before the notary?

A. I recall the date when it was acknowledged.

Q. The notary appears to be N. W. Hicks, is that correct? A. That's right.

Q. And it is Mr. or Mrs. or Miss. A. Mr.

Q. Does Mr. Hicks have a place of business anywhere?

A. Yes, sir, he has a place of business right across from 921 Del Paso Boulevard, North Sacramento.

Q. Did you, on the day that the notarial acknowledgement bears date, to wit: the 12th day of December, 1944, appear before Mr. Hicks? A. Yes, sir.

Q. And did you have with you the lease contract which is marked Trustee's Exhibit 1?

A. Yes, sir.

Q. Now, when you appeared before Mr. Hicks, the notary, did the signature, Clyde Henry, president, under U. S. Machinery Company, on this lease contract, marked Exhibit 1, have at the time you appeared before the notary—had that signature been affixed to that instrument? [48]

A. No, sir. I signed it in the presence of Mr. Hicks.

Q. So that this signature, Clyde Henry, appearing under U. S. Machinery Company, and also in pen and ink below, the signature, Clyde Henry, president, was affixed by whom? A. By myself.

Q. And that is your signature? A. Yes.

(Testimony of Clyde W. Henry)

Q. And you are the president of the U. S. Machinery Company? A. Right.

Q. On what date did you affix that signature?

A. On the 12th day of December, 1944.

Q. And you were acting in what capacity on that occasion?

A. As president of the U. S. Machinery Company.

Q. And for and on behalf of the U. S. Machinery Company? A. Yes, sir.

Q. Now, did you on that occasion have any other instrument? A. Yes, sir.

Q. What?

A. I had this particular contract you are now looking at.

Q. Now, we are looking at the instrument which has been marked Trustee's Exhibit 2?

A. Yes, sir. [49]

Q. And which bears on the reverse side of it a rec-
ordation of the recorder of Calavares County as of the
18th day of December, 1944, is that right?

A. Yes, sir.

Q. I will ask you to look at the signature, Clyde Henry, and then the word president underneath that, which has been written under the U. S. Machinery Com-
pany, at the bottom on Trustee's Exhibit 2, whose sig-
nature is that? A. Mine.

Q. Did you affix that yourself? A. Yes, sir.

Q. On what date did you affix that signature on Trustee's Exhibit 2?

A. On December the 12th, 1944.

(Testimony of Clyde W. Henry)

Q. And in what capacity were you affixing that signature?

A. As president of the U. S. Machinery Company.

Q. And for and on behalf of the U. S. Machinery Company? A. Yes, sir.

Q. Now, on that occasion, do you remember whether it was in the morning or the afternoon, or what?

A. To the best of my recollection it was in the afternoon; I would say about 2:30.

Q. Were you accompanied by anyone else?

A. Yes, sir. [50]

Q. By whom? A. Mr. Harry Satterfield.

Q. At the time that you appeared before Mr. Hicks, the notary, on the 12th day of December, 1944, with the instrument which has been marked Trustee's Exhibit 2, had the signature of Clyde Henry, president, been affixed at that time?

A. No, sir, not previous to that.

Q. And it was, as you have testified, signed by you in the presence of the notary? A. Yes.

Q. And on that date? A. Yes, sir.

Q. Do you recall what you did, after these two exhibits, 1 and 2, were notarized by the notary? Were they returned to you?

A. Yes, sir, they were handed right back to me by the notary.

Q. And did you do anything in connection with those exhibits or copies of the exhibits, to the best of your recollection?

A. The copies of the exhibits I mailed to the Quartz Crystal Company, and the original I mailed to the recorder in San Andreas.

(Testimony of Clyde W. Henry)

By Mr. Thomasset: That is all.

The Referee: Do you have any questions? [51]

Mr. Chichester: Yes, your Honor.

Q. By Mr. Chichester: Who is Mr. H. D. Stockley?

A. He was a man who worked for me; one of the superintendents of the plant.

Q. Where did he work on December the 12th, 1944?

A. At Del Paso Boulevard, North Sacramento, in my shop.

Q. What kind of a position did he hold?

A. Superintendent.

Q. Of the shop? A. Yes.

Q. The U. S. Machinery Company is a corporation, is it? A. Yes, sir.

Q. Apparently his signature appears on Trustee's Exhibit 1 and is scratched out, is that correct?

A. Yes.

Q. Who scratched it out? A. I did.

Q. And when did you do that?

A. When I signed it, on December the 12th, 1944.

Q. Did you sign Exhibit 2 on December the 12th, also. A. Yes, sir.

Q. Did it have any signature on it when you received it? A. No, sir.

Q. By Mr. Thomasset: The question is a little vague.

The Witness: I took it for granted you meant did it have [52] Stockley's signature on it.

Q. Yes. A. It did not.

Q. Referring to the material referred to in Exhibit 1, had the material called for in that instrument been delivered to Mr. Buell, or Mr. Biggy, or Mr. Collins?

(Testimony of Clyde W. Henry)

Mr. Thomasset: I think that has been gone into.

The Referee: Yes, it has been covered.

Mr. Chichester: No other questions.

Q. By The Referee: You were selling this type of machinery under the price ceilings of the Office of the O.P.A., were you not?

A. Yes, sir. All of our machinery—The O.P.A. had a lease price and also a sales price; this was sold under the lease price.

Q. Was the reason—I believe the tractor, that is on a separate contract?

A. Yes, sir.

Q. Is that on Exhibit 1 or Exhibit 2?

A. One.

Q. That tractor was delivered way back—in other words, the property under that contract was delivered back in September, was it not?

A. Yes, sir. The reason for that was we had it on a lease contract to a man by the name of—he is a fellow who has a sawmill, I just can not recall his name, but we had it [53] leased to him and these people were negotiating for the lease on it, and rather than bring it into Sacramento we had it delivered to their property, which made a saving of 200 miles of drayage—Ken Knutting was the man's name; he had a sawmill near Placerville.

Q. The first payment was made a way back then, was it not?

A. Yes, sir, apparently that was when it was negotiated.

(Testimony of Clyde W. Henry)

Q. Why did you wait until November or December to make out the contract?

A. Well, with reference to the preliminary negotiation on it—I had nothing to do with it; I had the o. k. on it when it came to the final conclusion.

Q. They did make a deal to buy it from you at a certain figure and they made payments to you of quite a bit of money a way back, and apparently there was no contract prepared at that time, is that right?

A. Yes, sir.

Mr. Thomasset: Just for the purpose of the record, your Honor, is talking about buying and selling, these are lease contracts.

The Referee: All right; we will change it to lease contracts instead of buying and selling.

Q. Why was it that the contract was not prepared sooner? [54]

A. Well, they didn't know exactly what and how much of this equipment they were going to need or use.

Q. This had nothing to do with other equipment; this tractor was a separate deal, on a separate contract, was it not? A. Yes, sir.

Q. Were you waiting until they had made enough down payments to comply with O.P.A. regulations?

A. That could have been the reason, I am not exactly clear on that.

Q. The other contract, the property was not all ready for delivery at the inception of the deal, was it?

A. That is correct.

The Referee: Well, I guess that covers that. Are there any other questions?

Mr. Chichester: No questions.

(Testimony of Clyde W. Henry)

Mr. Thomasset: No questions. Mr. Henry, you may step aside.

Mr. Thomasset: Mr. Satterfield, would you take the stand, please.

HARRY SATTERFIELD

having been first duly sworn on oath, testified as follows:

By Mr. Thomasset:

Q. Your name is what? A. Harry Satterfield.

Q. What is your address? [55]

A. My business address?

Q. Yes.

A. It has been 503 Van Ness Avenue, San Francisco, but that property has been sold and we have changed our address, but that is what it was at that time.

Q. Do you know Mr. Clyde Henry, who preceded you on the stand? A. I do.

Q. Do you recall being with him in Sacramento on an occasion in 1944? A. I do.

Q. I want you to look at these two instruments, one of them has been marked Trustee's Exhibit 1, and the other has been marked Trustee's Exhibit 2, each one has affixed to it a notarial acknowledgment, bearing the signature of N. W. Hicks, do you recall being in Sacramento with Mr. Henry at any time when you saw those exhibits? A. I was in Sacramento at that time.

Q. You were? A. Yes, sir.

Q. And do you recall being at Mr. Hick's place of business? A. Yes, sir.

Q. What kind of a business did he have?

A. A gasoline business.

(Testimony of Harry Satterfield)

Q. What does he have, an office there? [56]

A. He has an office off to the side there.

Q. Do you recall the date, independently of these contracts?

A. Well whatever date that paper was—

Q. Do you remember seeing those instruments, by instruments I mean these two papers which have been marked Trustee's Exhibit 1, and Trustee's Exhibit 2. Now, let's take a look at Trustee's Exhibit 1, and I call your attention to the signature, Clyde Henry, president, underneath U. S. Machinery Company, did you see Mr. Henry affix that signature?

A. Well, I saw him take those papers in there while we were getting gasoline. They both of them signed, this gentleman, the notary, and Mr. Henry; I didn't know he was a notary at the time though.

Q. What about Trustee's Exhibit 2, calling your attention to the signature, Clyde Henry, president, under U. S. Machinery Company; were you present at the time Mr. Henry affixed that signature?

A. Yes, sir.

Q. Was that at the same time that the notary signed that acknowledgment?

A. They both signed.

Q. They both signed at the time?

A. Yes, sir.

Q. You were not exactly in the office were you when Mr. Henry signed? [57]

A. No, I was sitting in the car.

Q. You were in the car; about how far away?

A. About 15 feet; the gasoline pumps and the car and then the office.

(Testimony of Harry Satterfield)

Q. When you say you saw Mr. Henry sign both of these instruments, what do you mean; what, if anything, attracted your attention?

A. As he got out of the car he had the papers; they looked like they were legal papers; I saw him take them out of his pocket and walk over to the office; I was in a hurry to get to San Francisco and they spent a lot of time in the office and I said, "What was all the time for?" And he said, "I have to get these signatures on this lease." At that time I was going to buy machinery, a shovel.

Q. You are in that kind of business?

A. Yes, sir. I was trying to get a shovel, a tractor, and a bulldozer, and also a rooter.

Q. When he came back did you take a look at the contracts?

A. I said, "What did you take all of the time about?" and he said, "Here is the title on some of the machinery you wanted, but it is sold."

Q. Now, were these signatures apparently freshly written at the time you looked at them?

A. Yes, sir.

Q. Do you know what I mean? [58]

A. Yes, they were fresh. They just was writing them.

Mr. Thomasset: That is all.

Q. By the Referee: You were in the car and he went into the office, a little room where the notary was, some 15 feet or so away? A. That is right.

(Testimony of Harry Satterfield)

Q. And then apparently he signed these papers and had the notary affix the seal? A. Yes, sir.

Q. And came back out? A. That's right.

Q. Well, you don't know anything about what the document showed or contained, do you? He didn't take the papers out of his pocket when he came back, did he?

A. No; when he came back, he said, "Here is some of the stuff you were trying to buy."

Q. But he had already sold it? A. Yes, sir.

Q. Counsel's question seemed to imply that you saw these instruments and very carefully scrutinized them.

A. Well, I did take a look at some of the prices.

Q. The Referee: He showed you his contracts when he came back? A. Yes, sir.

Q. And his signatures were already on them?

A. Yes, sir. [59]

The Referee: I see. Any other questions?

Mr. Thomasset: No other questions.

Mr. Chichester: No other questions. The witness is excused.

Mr. Thomasset: Your Honor, I ask the privilege at this time to take the deposition, by written interrogatories, of the Notary, and for that purpose I would like to have photostatic copies made of both of them.

The Referee: Is that disputed? Your main point is he went in there at that time and signed the papers at that time.

Mr. Thomasset: That they were not signed prior to that.

Mr. Chichester: They were not signed on the date the instruments bear?

Mr. Thomasset: No; on the date the acknowledgment bears.

The Referee: You know, of course, that is what the Notary will testify to?

Mr. Thomasset: That is right,

The Referee: I don't believe you have to go to that trouble.

Mr. Chichester: I don't think the Trustee will object to that. I don't think it has a scintilla of objection.

The Referee: Well, certainly the Trustee has nothing to the contrary to show, that I have heard.

Mr. Thomasset: Then can it be stipulated that it shall be deemed that the Notary, N. W. Hicks, has been called [60] and testified that Trustee's exhibits "1" and "2" were signed before him; and by signing I mean the signatures of Mr. Henry as they now appear, were signed before him on that date, that is the 12th day of December, 1944?

The Referee: I think the Trustee should agree to that. I will take that as the evidence, in lieu of the deposition.

(Thereafter there was further discussion between the Referee and counsel, after which court was adjourned)

[Endorsed]: Filed Mar. 6, 1947. [61]

[Endorsed]: No. 11705. United States Circuit Court of Appeals for the Ninth Circuit. William I. Hefron, Trustee of the Estate of Quartz Crystal Products Co., a limited partnership composed of Raymond I. Biggy, John W. Buol and James F. Collins, Bankrupt, Appellant, vs. U. S. Machinery Company, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed August 12, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11705

WILLIAM I. HEFFRON, TRUSTEE FOR QUARTZ
CRYSTAL PRODUCTS CO., a limited copartner-
ship composed of RAYMOND I. BIGGY, JOHN
W. BUOL and JAMES F. COLLINS, Bankrupt,
Appellant,

vs.

U. S. MACHINERY CO.,

Appellee.

DESIGNATION OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD TO
BE PRINTED

I.

Appellant hereby designates and adopts as its points on appeal the points heretofore set forth in its statement of points on which appellant will rely on appeal filed in the District Court of the United States for the Southern District of California, Central Division, on the within appeal.

II.

Appellant does hereby designate and adopts for printing the certified transcript of the record as filed by the

Clerk of the United States District Court, Southern District of California, Central Division, on the within appeal.

Dated this 8th day of September, 1947.

GEORGE T. GOGGIN

Attorney at Law

817 H. W. Hellman Building

354 South Spring Street

Los Angeles 13, California

MUtual 2248

Attorney for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 10, 1947. Paul P. O'Brien,
Clerk.

